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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 824

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *Appellant*

against

MILO R. MALTBIE, NEAL BREWSTER, MAURICE C. BURRITT, GEORGE A. ARKWRIGHT and SPENCER B. EDDY, constituting the Public Service Commission of the State of New York, and the PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Appellees.*

STATEMENT AS TO JURISDICTION

Nature of the Case

The appellant, Consolidated Edison Company of New York, Inc., is a public utility operating in the City of New York, subject to the jurisdiction of the New York Public Service Commission under the provisions of the New York Public Service Law.

On May 29, 1946, the Public Service Commission formally instituted under the designation of Case No. 12455 an investigation and hearing relative to the determination of just and reasonable rates for electric service furnished by

the appellant. Hearings began on June 28, 1946, and continued from time to time to December 2, 1948, when the record was closed. On December 30, 1948, the Commission issued an order in P.S.C. Case No. 12455, pursuant to Section 114 of the New York Public Service Law, requiring the appellant to make effective a so-called "temporary reduction" in appellant's rates for electric service supplied to general consumers under thirteen separate Service Classifications. The reduction is a flat ten per cent reduction in bills to general electric consumers (exclusive of fuel charge), estimated to be in gross not less than $21,500,000 a year and in net, after income and gross revenue taxes, not less than $12,427,000 a year.

By a petition verified January 6, 1949, the appellant asked the Commission for a rehearing and for a postponement of the effective date (January 10, 1949) of the temporary rates. On January 13, 1949, the Commission denied the petition for rehearing.

Following the denial of its petition, the appellant commenced a proceeding in the Supreme Court of the State of New York, Albany County, for review of the Commission's Order and determination, pursuant to Article 78 of the New York Civil Practice Act. Pending the determination of the review proceeding, the appellant sought and obtained an order from the Appellate Division staying and suspending the temporary rates (*Matter of Consolidated Edison Co.* v. *Maltbie,* 275 App. Div. 731). Upon appeal by the Commission, the order granting the stay was reversed by the Court of Appeals (*Matter of Consolidated Edison Co.* v. *Maltbie,* 299 N. Y. 172), and the temporary rates were continued in effect pending review.

In the review proceeding instituted under Article 78, the Appellate Division, by a divided Court (Foster, P. J., dissenting), annulled the Order of the Commission on the law

(*Matter of Consolidated Edison Co.* v. *Maltbie*, 275 App. Div. 475). Pending appeal by the Commission from the latter decision, the Appellate Division's order of annulment was stayed. Upon appeal by the Commission, the Court of Appeals, also by a divided Court (Conway and Dye, JJ., dissenting), reversed the decision below and reinstated the Order and determination of the Commission (*Matter of Consolidated Edison Co.* v. *Maltbie*, 300 N. Y. 196). Appellant applied for reargument or, in the alternative, for an amendment of the remittitur of the Court of Appeals. On January 13, 1950, the Court of Appeals made an order denying the motion for reargument and amending the remittitur as requested (Id., 300 N. Y. 645).

Date of Order and Judgment Sought to Be Reviewed and Date of Application to Appeal

The order and judgment of the Supreme Court of the State of New York sought to be reviewed was entered on January 23, 1950, upon the final decision and order of the Court of Appeals made January 13, 1950, denying the appellant's motion for reargument and amending the remittitur of the Court of Appeals as requested.

The date on which the application for appeal is presented is April 12, 1950.

Opinions Below

Attached hereto as Exhibits A to G, respectively, are the following:

Order of the Commission, dated December 30, 1948, in P.S.C. Case No. 12455, prescribing temporary electric rates for the appellant (Exhibit A);

Memorandum approved by the Commission in support of its temporary rate Order—78 P.U.R. (NS) 221 (Exhibit B);

Opinion of the Appellate Division, Third Department, granting a stay of the temporary rates pending the review proceeding—275 App. Div. 731 (Exhibit C);

Opinion of the Court of Appeals reversing the stay order —299 N. Y. 172 (Exhibit D);

Majority and dissenting opinions of the Appellate Division, Third Department, in the review proceeding under Article 78—275 App. Div. 475 (Exhibit E);

Majority opinion and dissenting memorandum of the Court of Appeals reversing the order of the Appellate Division and reinstating the Order of the Commission—300 N. Y. 196 (Exhibit F);

Memorandum of the Court of Appeals denying reargument and amending remittitur as requested—300 N. Y. 645 (Exhibit G).

Statutory Provision Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is 28 U.S.C. § 1257 (New Title), which provides in pertinent part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Statutes of the State Involved

The statutes of the State, the validity of which is involved, are the Order of the Public Service Commission, dated December 30, 1948, and Section 114 of the New York Public

Service Law (Laws of New York, 1934, C. 287, pp. 796-797; see, also, 47 McKinney's Consol. Laws of N. Y., Pub. Serv. L., § 114). The Commission's Order is attached hereto as Exhibit A. Section 114 of the Public Service Law provides:

"§ 114. *Temporary Rates*

"To facilitate prompt action by the commission in proceedings involving the reasonableness of the rates of any public utility and to avoid delay in any such rate proceeding, the commission is hereby authorized to require any public utility company to establish, provide and maintain continuing property records, including a list or inventory of all of the physical property actually used in the public service, and to require any public utility company to keep its books, accounts and records in such manner as to show currently the original cost of said physical property and the reserves accumulated to provide for the retirement or replacement of said physical property.

"The commission may, in any such proceeding, brought either on its own motion or upon complaint, upon notice and after hearing, if it be of opinion that the public interest so requires, immediately fix, determine and prescribe temporary rates to be charged by said utility company pending the final determination of said rate proceeding. Said temporary rates so fixed, determined and prescribed shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical property of said public utility company used and useful in the public service, and if the duly verified reports of said utility company to the commission do not show the original cost, less accrued depreciation, of said property, the commission may estimate said cost less depreciation and fix, determine and prescribe rates as hereinbefore provided.

"Temporary rates so fixed, determined and prescribed under this section shall be effective until the rates to be charged, received and collected by said utility company shall finally have been fixed, determined

and prescribed. The commission is hereby authorized in any proceeding in which temporary rates are fixed, determined and prescribed under this section to consider the effect of such rates in fixing, determining and prescribing rates to be thereafter charged and collected by said public utility company on final determination of the rate proceeding."

Manner in Which the Federal Questions Were Raised

In its petition to the Public Service Commission for a rehearing, in its petition for review in the Supreme Court of the State of New York, and in its briefs before the New York Courts, the appellant alleged and asserted, specifically and in detail, that the Order of the Commission fixing temporary rates and Section 114 of the Public Service Law, construed to authorize the making of the Order, were unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Thus, in its petition for rehearing before the Commission, the appellant claimed that it had "been denied a full and fair hearing in that the Commission has not purported to have given consideration to much of the evidence presented by the Company" (fol. 249),[1] that the rate of return provided by the temporary rates was "wholly arbitrary and unreasonable, is insufficient to enable the Company to maintain its credit and attract capital on advantageous terms" (fol. 280), and that the Order of the Commission was contrary to "constitutional guarantees of due process of law" (fol. 275).

The appellant's petition for review by the New York Supreme Court under Article 78 of the New York Civil Practice Act, alleged (fols. 126, 129) that Section 114,

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[1] Folio references are those in the Record on Review and Appeal in the Court of Appeals.

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construed to enable the Commission to prescribe temporary rates "without giving any full or fair consideration to the evidence in the record before the respondent [Commission]", would operate "to deprive the petitioner [appellant] of its property without due process of law and to deny to the petitioner the equal protection of the laws, in violation of Amendment XIV of the United States Constitution." It further alleged (fol. 131) that the Commission's Order deprived the appellant of Constitutional guarantees in that the "rates and charges are less than just and reasonable rates and charges, and do not provide a fair return upon the property used by the petitioner for electric service to its customers."

The opinion of the Appellate Division in the review proceeding, upon the basis of which the two dissenting Justices in the Court of Appeals voted to affirm, stated (*Matter of Consolidated Edison Co.* v. *Maltbie*, 275 App. Div. 475, 481):

> "• • • If the contention of the respondents were sustained the commission could always resort to an estimate by the simple expedient of adopting a method of computing depreciation which would produce an amount in excess of that produced by the method used by the utility. In result this would be the grant of an arbitrary power to determine the temporary rate • • •."

Point II of this appellant's brief before the Court of Appeals on the merits of the review proceeding (pp. 60-72) was stated as follows (p. 60):

> "Assuming that the question of depreciation presented issues of fact, the Commission was bound to consider and weigh all of the relevant evidence given by the opposing witnesses, and its failure to do so amounted to a denial of due process of law to the Company."

Point III of the same brief (pp. 72-85) was stated as follows (p. 72):

> "Section 114 of the Public Service Law, if construed to authorize the present action of the Commission, is unconstitutional."

Under this point it was argued by the appellant (pp. 72-73):

> "As interpreted and applied by the Commission in the instant case, Section 114 would permit the Commission to resort to the device of fixing temporary rates, for an indefinite period, upon very limited factors in derogation of established constitutional principles, in order that the Commission may avoid its responsibility for rendering a decision upon the whole record of closed hearings as to just and reasonable rates; to predicate temporary rates upon an arbitrary and hybrid formula, which represents neither the net investment in the entire property of the Company used and useful in the public service nor the fair value of the property; to adopt arbitrarily a rate of return which is plainly insufficient to enable the Company currently to meet the cost of capital; to disregard the actual wage costs required for rendering safe and adequate service to the public, and to disregard all relevant evidence presented by Company witnesses, and avoid weighing the evidence in the record and making specific findings and reasoned conclusions thereon.
>
> "We submit that such a construction of Section 114 and the resulting rate Order of the Public Service Commission would, if sustained in this case, clearly violate the Company's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Sections 6 and 11 of the First Article of the New York State Constitution."

The Federal questions thus raised were passed upon by the Court of Appeals. As stated in the amended remittitur of that Court:

> "Questions under the Federal Constitution were presented and passed upon by this Court, viz., whether

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Section 114 of the Public Service Law of the State of New York and the order of the Public Service Commission dated December 30, 1948, in Case No. 12455, made pursuant thereto, violated any of the rights of the respondent guaranteed by Section 1 of Amendment XIV of the Federal Constitution. This Court held that the aforesaid statute and order of the Commission did not violate any of the rights of the respondent guaranteed by that provision of the Federal Constitution."

Cases Believed to Sustain Jurisdiction

The cases believed to sustain the jurisdiction of this Court in the case at bar are:

Bluefield Co. v. *Public Service Commission*, 262 U. S. 679, 683;
Northern Pacific v. *Department of Public Works*, 268 U. S. 39, 42;
King Manufacturing Co. v. *Augusta*, 277 U. S. 100, 114;
Ohio Bell Telephone Co. v. *Commission*, 301 U. S. 292, 299-300;
Lincoln Union v. *Northwestern*, 335 U. S. 525, 529;
Kovacs v. *Cooper*, 336 U. S. 77, 78;
Williams v. *New York*, 337 U. S. 241, 243.

Statement of the Grounds upon Which It Is Contended the Questions Involved Are Substantial

The hearings before the Commission (P. S. C. Case No. 12455) were concluded on December 2, 1948, and the case was accordingly "closed" on the record by the presiding Commissioner (fol. 18335). Undoubtedly, the record at that time, which comprised about 8,500 pages of testimony and approximately 400 exhibits, was such as to enable the Commission to fix fair and reasonable permanent rates.

However, the Commission, asserting that it would take "several months" for it to "dispose of" or "settle" the

controverted "claims" and "questions" as to depreciation and other factors in fixing final rates, resorted to the device of fixing temporary rates. These rates were made under Section 114 of the New York Public Service Law, which empowers the Commission to require public utilities to maintain continuing property records and books, accounts and records showing the original cost of physical property and reserves for retirements and replacements, and further empowers the Commission, in a proceeding "involving the reasonableness of the rates of any public utility," to "immediately fix" temporary rates to be charged by a utility company pending the final determination of the rate proceeding. The statute requires that the temporary rates "shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical property of said public utility company used and useful in the public service." Under the concluding paragraph of the statute, sometimes referred to as the "recoupment" provision, the Commission is authorized "to consider the effect" of the temporary rates in prescribing final rates.

It is the appellant's contention that the procedure pursued by the Commission in determining temporary rates for appellant and the confiscatory effect of those rates upon the appellant's property are such as to render unconstitutional, under Section 1 of Amendment XIV to the Federal Constitution, the Commission's Order and Section 114 under which it was made. The constitutional issues thus presented and the grounds upon which their substantial nature is predicated are set forth as follows:

I. In arriving at a rate base under Section 114, the Commission deducted from the amount of the original cost of the appellant's physical property, as shown by the duly verified reports made by the appellant to the Commission

and the books, accounts and records kept by the appellant, an "estimated" amount of $256,058,055 for accrued depreciation (fols. 214-215). This "estimated" amount for accrued depreciation exceeded by $95,500,000 the actual amount of accrued depreciation shown by the duly verified reports made by the appellant to the Commission and its books, accounts and records kept in accordance with Sections 66 and 114 of the Public Service Law (fols. 192-195; 95-97).

The Commission's opinion affirmatively shows that such "estimate" of accrued depreciation in no way represented the result of a consideration and weighing of the conflicting evidence presented by the appellant's witnesses and the Commission's witness on the element of depreciation as a "loss in value." According to the approved memorandum of the Commission, a fair consideration and analysis of the conflicting evidence before it, including that related to the element of depreciation, would have taken "many weeks and probably several months" (fols. 167, 176, 197). Nevertheless, the Commission adopted and used, in calculating the amount of the drastic rate reduction ordered by it, the severely disputed testimony of a single Commission witness.

This arbitrary course of procedure, in which the Commission chose from the mass of controversial evidence the testimony of a single witness, without making any finding upon the evidence, without considering opposing evidence, and without setting forth the reasons and factual grounds for its choice, denied to the appellant the procedural due process of law guaranteed under Section 1 of Amendment XIV to the Constitution of the United States.

The Chicago Junction Case, 264 U. S. 258, 265;
Southern Ry. Co. v. *Virginia,* 290 U. S. 190, 198;
Morgan v. *United States,* 298 U. S. 468, 480;
Ohio Bell Telephone Co. v. *Commission,* 301 U. S. 292, 305;

Railroad Commission v. *Pacific Gas Company*, 302 U. S. 388, 392-394;
Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 583-584.

II. In determining the electric operating expenses and operating income of the appellant for the base annual period used by the Commission in prescribing temporary rates under Section 114, the Commission similarly deducted from the amount of annual depreciation expense, and added to the amount of annual income from electric operations, as shown by the appellant's duly verified reports and books, an amount of $2,278,888 (fol. 202).

The evidence before the Commission, however, established that the amount of annual depreciation expense so charged and shown on the appellant's books, accounts and records, had been dictated by orders issued by the Commission itself in 1947, in connection with the Commission's authorization to the appellant for the issuance of securities (fols. 118-121, 16031-032).

The Commission's action, in the face of this evidence, in choosing the opinion testimony of a single witness, without considering and weighing opposing evidence, without making findings on the evidence before it, and without setting forth the reasons and factual grounds of its choice, constitutes a denial of procedural due process guaranteed to the appellant under the Constitution.

The Chicago Junction Case, 264 U. S. 258, 265;
Morgan v. *United States*, 298 U. S. 468, 480;
Railroad Commission v. *Pacific Gas Company*, 302 U. S. 388, 392-394.

III. When the Commission undertook to prescribe temporary rates under Section 114 of the New York Public Service Law, the uncontradicted evidence in the record before it was

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that the experienced cost of capital to the appellant, as of June 30, 1948, was 6.24 per cent (Exs. 369, 370; fols. 17700-715), and that the appellant required such rate of return in order to assure confidence in the financial integrity of the enterprise so as to maintain its credit and to attract necessary capital. In complete disregard of this evidence, and although Section 114 provided for a five per cent return upon original cost less depreciation only as a minimum below which the Commission could not go, the Commission's Order prescribed temporary rates computed so as to provide no more than a return of five per cent upon the rate base arbitrarily adopted by it as aforesaid.

The procedure adopted by the Commission, of prescribing temporary rates without considering and weighing the evidence before it on the subject of rate of return, without denying or contradicting the probative force of such evidence, and without making a single finding as to a reasonable rate of return to be provided by the temporary rates, constitutes a denial to the appellant of procedural due process of law.

The Chicago Junction Case, 264 U. S. 258, 265;

Southern Ry. Co. v. *Virginia*, 290 U. S. 190, 198;

Morgan v. *United States*, 298 U. S. 468, 480;

Ohio Bell Telephone Co. v. *Commission*, 301 U. S. 292, 305;

Railroad Commission v. *Pacific Gas Company*, 302 U. S. 388, 392-394;

Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 583-584.

IV. The Commission's Order prescribing temporary rates, upon a rate base which was reduced $95,500,000 by the Commission's arbitrary "estimate" of accrued depreciation (fols. 95-97, 192-195), and upon the basis of operat-

ing expenses from which it arbitrarily excluded $2,278,881 for annual depreciation expenses charged in compliance with the Commission's orders made in connection with the issuance of securities (fols. 118-121, 16031-032), and which failed to give full effect to wage increases made by the appellant for the calendar year 1948 (fols. 14225-241; Ex. 310) or any effect to anticipated wage increases for the calendar year 1949 (fols. 18330-334) and was calculated to provide a return of no more than five per cent upon such rate base, in the face of uncontradicted evidence that the appellant required a return of 6.24 per cent to insure its credit and to attract necessary capital, and which in fact provided a return for the base year ($30,261,000—fol. 102) of only 4.38 per cent upon the originl cost less depreciation per books of account of the physical property used and useful in the appellant's electric service ($691,500,000, inclusive of Construction Work in Progress but exclusive of non-physical property—fols. 193-195, 214-216), results in the confiscation of appellant's property without due process of law and the denial to it of the equal protection of the laws.

Bluefield Water Works Co. v. *Public Service Commission,* 262 U. S. 679;

Federal Power Commission v. *Hope Natural Gas Company,* 320 U. S. 591.

V. As construed by the Court of Appeals, Section 114, which thus enables the Commission to prescribe, for an indefinite period, temporary rates upon a rate base and rate of return adopted by it as a matter of administrative fiat, without considering and weighing relevant evidence, without making findings thereon, and without disclosing the reasons and factual grounds underlying its determination, constitutes a grant of unlimited and unfettered discretion

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and a delegation of arbitrary power, in violation of Section 1 of Amendment XIV to the Constitution.

Interstate Commerce Commission v. *Louisville & Nashville R. R.*, 227 U. S. 88, 91;
Wichita R. R. v. *Public Utilities Commission*, 260 U. S. 48, 58-59;
Panama Refining Co. v. *Ryan*, 293 U. S. 388;
Schechter Corp. v. *United States*, 295 U. S. 495.

VI. The provision in Section 114, authorizing the commission, in prescribing final electric rates, to allow the appellant to recoup "losses" suffered from temporary rates, is not a sufficiently adequate, certain or convenient protection to the appellant to warrant the imposition, without according to the appellant procedural due process, of confiscatory temporary rates to be charged for an indefinite period of time, and operates to deprive the appellant of its property without due process of law and to deny to it the equal protection of the laws.

Joslin Company v. *Providence*, 262 U. S. 668, 677, 678;
Oklahoma Gas Company v. *Russell*, 261 U. S. 290, 293;
West Ohio Gas Co. v. *Commission*, 294 U. S. 79, 83;
West v. *Chesapeake & Potomac Telephone Co.*, 295 U. S. 662, 671.

VII. As presently construed, the laws of the State of New York do not afford any effective judicial review of temporary rates prescribed under Section 114 (See *Staten Island Edison Corpn.* v. *Maltbie*, 267 App. Div. 72, aff'd 292 N. Y. 641, dismissing equity action against temporary rates; *County Transportation Co.* v. *Maltbie*, 273 App. Div. 437, in equity action against final rates identical with temporary rates, granting injunction pendente lite against final rates but denying injunction pendente lite against temporary rates). This denial of all effective judicial re-

view of the Commission's Order prescribing temporary rates operates to deprive the appellant of its property without due process of law and to deny to it the equal protection of the laws.

Chicago, M. & St. P. Railway Co. v. *Minnesota,* 134 U. S. 418.

Conclusion

We respectfully submit that this Court has jurisdiction of this appeal.

Dated: New York, N. Y., April 11, 1950.

WHITMAN, RANSON, COULSON & GOETZ,
Attorneys for Appellant;
JACOB H. GOETZ,
RICHARD JOYCE SMITH,
Of Counsel.

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EXHIBIT A

Commission's Order of December 30, 1948, prescribing temporary rates.

STATE OF NEW YORK, PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on December 30, 1948.

Commissioners present: Milo R. Maltbie, Chairman; Neal Brewster, George A. Arkwright, Spencer B. Eddy.

Case 12455—Proceeding on motion of the Commision as to the rates and charges of Consolidated Edison Company of New York, Inc. for electric service.

• • • • • • •

This Commission having by order adopted May 29, 1946 instituted an investigation to determine whether the rates, charges, classifications of service and regulations of Consolidated Edison Company of New York, Inc. are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law and, if so found, to fix and establish just, reasonable and proper rates, charges, classifications of service and regulations, and public hearings after due notice having been held and the Commission having determined that the public interest requires a change in certain of the rates and charges of Consolidated Edison Company of New York, Inc. as immediate, reasonable temporary rates to be charged by the said company pending the final determination of this proceeding and having further determined that the temporary rates herein fixed and prescribed are sufficient to provide a return of not less than 5 per cent upon the original cost less accrued depreciation of the physical property of the said corporation used and useful in the public service, it is ordered:

1. That the following rates and charges be and they hereby are fixed, determined and prescribed as temporary rates to be charged by Consolidated Edison Company of New York,

Inc. on and after January 10, 1949 pending the final determination of this proceeding.

A. The total charges made to every consumer for electric service as computed under the rates and charges set forth in Service Classifications Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of its tariff P.S.C. No. 4—Electricity, are hereby reduced by 10 per cent.

B. The reductions herein directed are not to be applied to the increases or decreases resulting from the application of the fuel adjustment clause of the company's filed tariff schedules.

2. That Consolidated Edison Company of New York, Inc. be and it hereby is directed to establish on or before January 10, 1949 by tariff schedules filed on not less than 1 day's notice to the public and this Commission the rates and charges hereinbefore fixed, determined and prescribed.

3. That Consolidated Edison Company of New York, Inc. be and it hereby is directed to place on each bill for electric service computed on the basis of the rates and charges herein fixed, determined and prescribed the following notation:

> "Temporary 10 per cent reduction (exclusive of fuel surcharge) by order of the Public Service Commission dated December 30, 1948."

4. That Consolidated Edison Company of New York, Inc. be and it hereby is relieved of newspaper publication of the changes in rates and charges herein directed.

5. That within 5 days from the receipt of a certified copy of this order, Consolidated Edison Company of New York, Inc. shall notify this Commission in writing whether the terms, conditions and requirements of this order are accepted and will be obeyed.

By the Commission.

(Signed) MURRAY G. TANNER,
Secretary.

[SEAL]

FCB:FS.

STATE OF NEW YORK,
Public Service Commission, ss:

I have compared the preceding copy with the original Order of the Commission dated December 30, 1948, in Case 12455—Proceeding on motion of the Commission as to the rates and charges of Consolidated Edison Company of New York, Inc. for electric service, on file in this office, and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of the Public Service Commission, at the city of New York, this 30th day of December one thousand nine hundred forty eight.

——— ———,
Executive Secretary.

EXHIBIT B

Memorandum approved by the Commission in support of its temporary rate order of December 30, 1948.

STATE OF NEW YORK, PUBLIC SERVICE COMMISSION

Case 12455—Proceeding on motion of the Commission as to the rates and charges of Consolidated Edison Company of New York, Inc., for electric service.

APPEARANCES:

Philip Halpern, Counsel and Sherman C. Ward, Acting Counsel (by Frank C. Bowers and Raymond J. McVeigh, Assistant Counsel), for the Public Service Commission.

Whitman, Ranson, Coulson & Goetz (By Jacob H. Goetz, Cameron F. Mac Rae, Henry F. Lippitt, II and Robert G. Miller), 40 Wall Street, New York, N. Y., Attorneys for Consolidated Edison Company of New York, Inc.

John J. Bennett, Charles E. Murphy and John P. McGrath, Corporation Counsel (by Charles F. Preusse, First Assistant Corporation Counsel, Andrew J. Bellanca, John J. Dorsey and Arthur J. Goldsmith, Assistant Corpora-

tion Counsels, John Suglia, Associate Assistant, Corporation Counsel, and W. G. Read, Engineer), City Hall, New York, N. Y. for the City of New York.

S. Palmer, Vice-President, and M. Palmer, Engineer Interboro Electric Light & Power Company, 10 East 43rd Street, New York, N. Y.

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Paul A. Fino (by Harold J. Robbins), 391 East 149th Street, Attorney for eleven commercial and residential property owners.

W. B. Talbot, 303 East 20th Street, New York, N. Y. in behalf of Greater New York Hospital Association.

Morris Feinstein, 1745 Caton Avenue, Brooklyn 26, N. Y. in behalf of Emerick Gross, 1812 Fulton Street, Brooklyn, N. Y., consumer.

Irving Smith, Jr., 110 William Street, New York, N. Y., in behalf of Automatic Fire Alarm Company and Consolidated Fire Alarm Company, Consumers.

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Herbert Hoffman, 89 Heywood Street, Brooklyn, N. Y., in behalf of Continental Baking Company, Consumer.

E. Turk, 120 Broadway, New York, N. Y., in behalf of Midland Park Property Owners' Association, Consumer.

Harry M. Wyretzen, 2245 Bedford Avenue, Brooklyn, N. Y., in behalf of Flatbush Boys' Club, Consumer.

C. P. Benneche, 205 East 42nd Street, New York, N. Y., associated with J. K. Blum, Consultant Engineer to the Federation of Jewish Philanthropies, Consumer.

Leopold Friedman (by Gilbert Walenstein), 1540 Broadway, New York, N. Y., in behalf of Hospital for Joint Diseases, Consumer.

William McAdoo, Jr., 79th Place and 71st Avenue, Glendale, N. Y. in behalf of Sawdust Sales Company, Consumer.

Proskauer, Rose, Goetz and Mendelsohn (by P. W. Haberman, Jr.), 11 Broadway, New York, N. Y., attorneys for Mount Sinai Hospital.

John H. Hayes, Lenox Hill Hospital, New York, N. Y., President of American Hospital Association in behalf of Greater New York Hospital Association.

Brown, Wheelock, Harris, Stevens Inc. (by Lewis M. Mauger), 14 East 47th Street, New York, N. Y., agents in behalf of several properties and consumers, including Central Hanover, 542 Fifth Avenue, New York, N. Y.

Francis Poret, 16 Court Street, Brooklyn, N. Y., in behalf of 8801 Shore Road Building Corporation.

Jacob Schader, 377 Broadway, New York, N. Y., attorney for Jefferson Properties, Inc. Consumer.

J. A. C. Jansen, Assistant to President, General Dry Cleaners Inc., 217 Russell St., Brooklyn 22, N. Y., Consumer.

Garey, Desvernine and Garey (by William Helfer), 63 Wall Street, New York, N. Y., Attorneys, and Philip F. Harling, Assistant to President, for the Brooklyn Fox Corporation, 1501 Broadway, New York, N. Y., Consumer.

Horace S. Ely & Company (by T. A. Taylor), 76 William Street, New York, N. Y., Agents in behalf of United Charities Buildings, East River Savings Bank and Continental Casualty Company, Consumers.

Irving Broun, President, Fred F. French Companies, 551 Fifth Avenue, New York, N. Y., Consumers.

Szold, Brandwen & Shubert (by Irving Michael Atkin), 30 Broad Street, New York 4, N. Y., Attorneys for Amalgamated Dwellings Inc. and Amalgamated Housing Corp.

Herman Stichman, Commissioner of Housing (by Herman Cohen, Counsel) of Division of Housing of the State of New York.

Harold J. Treanor and Morway Picket (by Paul Green, 285 Madison Avenue, New York City), 12 East 41st Street, New York, N. Y., Attorneys, and Caesar Nobiletti, 25 Broad Street, New York, N. Y., Chairman, Combined Public Utilities Committee, for the Real Estate Board of New York, Inc. and Midtown Realty Owners Association, Inc.

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Frank W. Chambers, 60 Broadway, New York, N. Y., Attorney for Trustees of Sailor's Snug Harbor and Spingler Van Buren Estates, Inc.

Charles A. Rathkopf, 271 Merrick Road, Lynbrook, N. Y., Counsel for Village of Lynbrook.

John J. Kirby, Attorney, and Byron E. Harding, Seventh and D Streets, SW., Washington, D. C., for Bureau of Federal Supply, U. S. Treasury Department.

Paul R. Young, 103 Washington Avenue, Albany, N. Y., Co-ordinator of Utility Contracts, State of New York, Executive Department, Division of Standards and Purchase.

Ignatius Castelli, 217 Broadway, New York, N. Y., Attorney for United Civic Association of Bronx and Pelham Bay Taxpayers Association.

Lesser and Lesser (by Harry Lesser), 55 W. 42nd Street, New York, N. Y., Attorneys for Williamsbridge Taxpayers Association, Wakefield Taxpayers and Civic League, Inc., Bathgate Taxpayers Association, Cranford Taxpayers Association and Ewald Taxpayers Association of the Bronx.

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Walter B. Caughlan, Jr., 111-8th Avenue, New York, N. Y., Senior Attorney for Port of New York Authority.
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* * * * * *

MALTBIE, Chairman:

This is a proceeding to determine the reasonableness of all of the rates and charges of the Consolidated Edison Company of New York, Inc. for all classes of electric service, including not only that rendered to general consumers but to departments of the United States government, the State of New York, and the City of New York, and the reasonableness of purchase and exchange agreements with certain other utilities. It was initiated by the Commission because no determination had ever been made as a result of a comprehensive survey of property, revenues and expenses, because it was frequently asserted by various interested parties that they were being overcharged and because comparisons between the rates of consolidated Edison and the rates charged in other cities and areas were often made.

The first hearing was held upon June 28, 1946 and the last upon December 2, 1948. Over 8,500 pages of testimony have been taken and about 400 exhibits received in evidence. Many of these exhibits are voluminous and several exceed 50 pages in number. Merely to digest the voluminous record and present the numerous questions to be decided before a whole rate schedule can be framed will take many weeks and probably several months.

In view of these facts, should the Commission undertake to exercise the authority conferred upon it by Section 114 of the Public Service Law and fix temporary rates to be operative until all of the issues in this proceeding can finally be determined?

In a brief submitted by counsel for the utility, dated December 6, 1948, it is urged as a reason why no temporary rate should be fixed that electric rate reductions aggregating more than $15,000,000 on an annual basis have been made by the company between November 1, 1945 and September 7, 1946, of which about one-half were made in 1946.

If nothing further were to happen, as a result of this proceeding, these reductions establish beyond peradventure the great need for the investigation and justify the claims so frequently made that the electric rates of the company were excessive. We shall not stop to discuss the application of *post hoc propter hoc,* but subsequent events have certainly justified the initiation of the proceeding.

The question now before the Commission is not the apportionment of credit for reductions of over $15,000,000 but whether electric customers of the Consolidated Edison are entitled to reduced rates while the extensive analysis and the many determinations above referred to are being made. That the Commission has power to do so is clear and it is noticeable that company counsel do not attempt to cite any facts from the record to indicate that a further reduction is not urgently needed. As will appear, the company is earning upon the basis specified in the Temporary Rates Law (Section 114) in excess of a fair return upon its electric property. Further, counsel concedes that if the rate schedule which it proposes were placed in operation, its revenues would be increased by approximately $2,800,000, without any allowance for growth of the business. It would be an unjustified disregard of the provisions of a law passed to deal with exactly such a situation if this Commission were to refuse to analyze the facts of record and decide now the matter would not even be considered.

Let us review a few of the high lights of this proceeding. In the early stages, it quickly appeared that the Consolidated Edison had never made any thorough analysis of the cost of service to any class of customers or to any of the blocks of consumptions in any rate classification. Rate changes were made from time to time, apparently to satisfy certain interests and certain complainants, often based upon what the traffic would bear or to prevent the construction of private plants to supply individual buildings or buildings immediately adjacent. Whether by so doing the company had placed an additional burden upon general consumers who were obviously without means to provide or secure electric service from other sources was a factor given little or no consideration.

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In certain instances, the company took on additional customers and charged therefor merely an "increment cost" following the principle that the last considerable group of customers or the last public utility supplied should pay only the *additional costs* which such service imposed without any contribution to the general costs incurred. This is a plan which this Commission has held to be no measure of reasonable charges and is the one which is causing untold trouble at present because charges for commutation service were originally fixed on this basis and commutation business has grown to such a great degree that the railroads cannot stand the burden which the plan unjustly imposes upon other customers.

Representatives of the federal government have presented testimony purporting to show that the rates which the company proposes to apply to federal departments in the State of New York are excessive.

The City of New York belatedly has presented testimony and is contending that nearly a million dollars should be eliminated from the figures submitted by the company in view of the terms of a contract between the City of New York and a conduit company. The rates for municipal service have never been fixed by the Public Service Commission. It is clear that street lighting is in a special class and deserves separate consideration.

The staff of the Commission has presented a large amount of testimony attempting to establish by their analyses the fundamental considerations which should determine reasonable rates. In many instances, the results presented are greatly divergent from the conclusions which the Consolidated Edison witnesses have endeavored to maintain.

Another factor in this proceeding which might be mentioned is the attempt by Consolidated Edison to restrict submetering, that is, the purchase of electric energy by landlords or others at wholesale and to be resold at retail. The representatives of large business interests claim that they were induced to enter the submetering business by the company itself and that the rates which have been established to secure this business should not be altered when the establishment of private plants has become difficult and even impracticable in some instances.

To settle all of these questions will, as already stated, require several months as it is incumbent upon the Commission to make a careful analysis of the facts and if possible to establish a basic rate structure adjusted to present conditions.

There is also before the Commission, a proceeding (Case 13423) in which the Consolidated Edison is requesting a considerable increase in gas rates due to the fact that in recent years wages have been greatly increased and the costs of materials used in the production of gas and maintenance of the property have also largely risen. The company has proposed a gas rate schedule which it estimates would increase its revenues upon the basis of 1948 sales to the extent of about $11,500,000. The testimony presented in this proceeding is to be reported to the Commission in a separate memorandum and is referred to here merely to present the complete picture and to note the relationship of the electric and gas departments and the combined effect upon the company as a whole.

Consolidated Edison is urging upon the Commission the need for an immediate gas rate decision, claiming that these rates should be increased *at once*. Upon the other hand, it is insisting that there should be no reduction in electric rates under the Temporary Rates Law. It maintains that the fixation of gas rates should not await the determination of a complete case, and inferentially that the Commission should not spend two and a half years in order to have a complete gas record and a final gas rate determined. Counsel apparently do not appreciate the incongruity of their claim that gas rates be increased at once because they are too low and that electric rates should stay as they are even though they may be too high.

It has been suggested upon behalf of gas consumers that the company is making more than a fair return from its gas and electric business and that gas rates should not be increased as long as the gas and electric businesses combined yield an adequate return.

The law is clear upon this point. The Court of Appeals held nearly thirty years ago that the rates of electric service and the rates for gas service must be determined each upon its own basis and that is is illegal to use the

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excess earnings from one class of service or from one department to offset a deficiency in earnings from another utility service or from another department (*Municipal Gas Company* v. *Public Service Commission*, 225 New York 89). Counsel for the Edison Company suggest in their brief that this decision is an "anachronism in the light of the present state of the art of rendering electric, gas and steam services by a combination company", attempting thereby to prevent any application of that decision to the present situation.

However, there are many decisions of the United States Supreme Court to the same effect which might be cited. Indeed, the principle has been carried further than stated above and it is established that a rate upon a commodity or a rate for a class of service must be reasonable per se and not justified merely because the company's earnings as a whole are satisfactory. If company counsel are right, why are they before this Commission in the gas case asking that the company's revenues be increased $11,500,000 when as will appear the revenues from the gas and electric departments combined are more than adequate?

As the decisions of the courts clearly indicate, it is the duty of this Commission to reduce or increase the rates of one kind of utility service regardless of the need for reduction or increase in rates in another class of service even though supplied by the same corporation.*

Now let us look at the facts of record and first as to revenues, expenses and income as reported to the Commission.

Reported Electric Operating Income

The reported operating income of the electric department for the calendar year 1947 and the fiscal year ended Septem-

* It is unnecessary here to discuss whether or not the decisions of the courts are sound, but it may be pointed out that if combined results were the test of reasonableness, it is obvious that in a given area where gas is supplied by a company rendering combined service, the gas rates would under existing conditions be very much lower than in an immediately adjacent area operating under exactly similar conditions where a company supplies *only* gas service and therefore is unable to offset its losses by recourse to a profitable electric department.

ber 30, 1948, compiled from the company's annual quarterly reports on file with the Commission is set forth in Table 1. The figures for the year ended September 30, 1948 are the latest available. The operating income before income taxes for this twelve month period was nearly $62,700,000 and about $46,700,000 after deduction of income taxes. The former is nearly $7,000,000 in excess of that for 1947, while the latter is only about $2,500,000 more

Table 1. Reported Electric Operating Income, 1947–1948

	Twelve Months Ended September 30, 1948	December 31, 1947
Sales of electric energy	$266,880,726.88	$246,278,550.72
Other revenues	2,869,861.75	2,797,686.63
Total operating revenues	$269,750,588.63	$249,076,237.35
Production	$ 84,579,518.06	$ 73,525,233.71
Transmission	382,560.68	274,328.57
Distribution	29,596,424.42	28,545,641.12
Customers' accounting and collecting	10,947,711.80	10,545,889.71
Sales promotion	4,478,013.52	4,496,982.24
Administrative and general	17,409,843.84	17,944,257.18
Depreciation	22,795,888.71	22,656,523.59
Operating taxes	36,872,217.50	35,231,605.74
Total revenue deductions	$207,062,178.53	$193,220,461.86
Operating income before income taxes	$ 62,688,410.10	$ 55,855,775.49
Federal income tax	15,960,000.00	11,600,000.00
Operating income after income tax	$ 46,728,410.10	$ 44,255,775.49
Kilowatt hours sold	9,536,506,711	9,010,647,800
Cents per kilowatt hour sold	2.80	2.75

due to the effect of large taxable deductions available from the refinancing program and used in computing the income tax for 1947.

It will be noted from the table that the reported revenues from the sales of electric energy during the year ended September 30, 1948 were $266,880,726.88—the highest for any twelve-month period in the history of the Consolidated Edison Company as it is now or on a consolidated basis prior to July 31, 1945. They exceed the revenues

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from the same source during 1947 by over $20,600,000 or 8.4 per cent.

An increase of this magnitude is very striking, particularly when one notes that these additional revenues were provided by low consumption customers paying higher average rates. The company sold 9,536,506,711 kwhrs. of energy during the year ended September 30, 1948 as compared with 9,010,647,800 kwhrs. in 1947, an increase of 5.8 per cent compared with an increase of 8.4 per cent in revenues. As a result, the average revenue per kwhr. increased from 2.73 cents in 1947 to 2.80 cents for the year ended September 30, 1948.

The reported revenue deductions, including depreciation expenses and operating taxes, for the year ended September 30, 1948 were about $207,000,000—nearly $14,000,000 higher than the same charges in 1947. The tabulation shows that over $11,000,000 of this increase appeared in production expense. It is principally accounted for by the increases in fuel prices and wages. The additional kilowatt hours generated would also be responsible for some portion of the increase. The remaining $3,000,000 of the increase is spread over the other expense groups with one-half of the amount appearing in operating taxes.

Accruals for federal income taxes were $4,360,000 greater in the fiscal year ended September 30, 1948 than in the calendar year 1947, obviously in part because the operating income during the former period was higher than in the latter, but the refinancing program in 1947 provided taxable reductions that saved the company $3,840,000 of income taxes in that year.

No adjustment of any of the figures reported by the company has been made in either period. But the staff of the Commission has challenged the propriety of many items upon the ground that they are abnormal or nonrecurring, improperly includible in costs to be paid by consumers or excessive in amount even if some reasonable amount should be allowed. None of these items is considered or ruled upon at this time; they are left for determination in final rates.

Rate Base Based on Book Figures

In order to ascertain what rate of return the electric department earned during the year ended September 30, 1948, a rate base for the property devoted to electric operations must be found. Using the reported book cost of property, book depreciation reserves and an estimate for working capital, an average rate base for the year would not exceed $662,500,000 as shown in Table 2.

During the course of the hearings in this proceeding, a number of contentions were advanced with respect to the book cost of the company's electric property which if allowed would have a significant effect in reducing the balances used in computing this rate base. A few of the more important claims relate to the excess of $17,000,000 allegedly included in the book cost of the East River generating station, large theoretical administrative and general expenses that were capitalized and included in the plant account balances since 1935, the apparently excessive proportion of common property assigned to the electric department and the used and useful character of a large amount of underground property.

In addition, the Commission staff claimed a very large deficiency in the book depreciation reserve relating to the electric property. While all of these and many other claims must be disposed of in fixing final rates, no adjustment has been reflected in Table 2 for any of these items. The figures there shown are the unmodified book figures as well as the company's full claim with respect to the proportion (85 per cent) of common property assignable to electric operations.

Certain items appear in Table 2 which are not usually found in a rate base compilation, due principally to the fact that the book amounts shown are as of September 30

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Table 2. Estimated Rate Base, Year Ending September 30, 1948
(All Company Figures Except Working Capital)

	September 30, 1947	September 30, 1948	Average
Electric plant in service	$699,969,904.42	$734,541,722.79	$717,255,813.60
Common utility plant (85 per cent)	47,110,231.22	49,628,974.15	48,369,602.68
Total plant in service	$747,080,135.64	$784,170,696.94	$765,625,416.28
Deduct:			
Reserve for depreciation of plant:			
Electric	$136,559,699.58	$150,163,540.79	$143,361,620.18
Common (85 per cent)	10,237,782.61	11,461,518.27	10,849,650.44
Other deferred credits:			
Electric	452,297.55	1,500,000.00	976,148.77
Retirement work in progress—debits:			
Electric	1,619,400.13	2,546,509.77	2,082,954.95
Common (85 per cent)	14,329.83	20,493.76	17,411.79
Total adjusted reserve for depreciation	$145,616,049.78	$160,558,055.53	$153,087,052.65
Book cost less reserve for depreciation	$601,464,085.86	$623,612,641.41	$612,538,363.63
Contributions in aid of construction	.....	61,114.79	30,557.39
	$601,464,085.86	$623,551,526.62	$612,507,806.24
Add:			
Estimating working capital			50,000,000.00
Total rate base			$662,507,806.24
Use			$662,500,000.00

rather than at the year end. As retirement work in progress balances are not closed out until the end of the year by debits to depreciation reserves, they should be deducted here to show a true picture. Certain deferred credits are also shown in Table 2 as they represent items that will ultimately be credited to the depreciation reserves and consequently have been so treated in this rate base calculation.

The only amount appearing on this table that is not a book figure is the estimate of working capital. The amount included is $7,500,000 less than the company's estimate for the calendar year 1947 which was submitted in the present proceeding (Exh. 335). The company's estimate

included a patently excessive figure for cash which purported to represent the additional cash needed by the electric department over and beyond its average working capital requirements for all other elements. Attention should also be called to the fact that the company's estimate for working capital reflects not only the average amount of fuel and other materials and supplies on hand but it also has been increased by a theoretical amount of over $6,500,000 said to be needed to bring the fuel stock on hand at the end of 1947 up to a purportedly required total of 1,500,000 gross tons of coal or its equivalent. Thus it will be seen that an allowance of $50,000,000 is a liberal estimate for the period.

Comparing the reported operating income of $46,728,410.10 for the year ended September 30, 1948 with the average rate base of $662,500,000 for the same period indicates the electric department earned a return of slightly over 7 per cent.

Adjustments to Book Figures

Reported book figures without modification are not the proper basis for determining temporary rates. Engineers of the Commission testified that the book depreciation reserve is deficient to the extent of about $96,500,000. Adjusting the rate base shown in Table 2 for this one factor alone would produce $566,000,000 as the average rate base for the year ended September 30, 1948.

A parallel correction must of course be made in the operating income to reflect the annual depreciation expenses consistent with the adjusted accrued depreciation. The engineers of the Commission estimated that an annual charge of $20,517,000 for the same period (year ended September 30, 1948) should be used instead of $22,795,888.71 charged by the company against electric operations. This would increase electric operating income by $2,278,888.71, producing $49,007,298.81.

As the Commission has stated repeatedly and as clearly indicated in the decision of the United States Supreme Court in the Chicago Telephone case (*Lindheimer* v. *Illinois Bell Telephone Company,* 292 U. S. 151), the determination of

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accrued depreciation and the amount to be included in operating expenses to build up a depreciation reserve must be consistent. Any party to a rate proceeding who contends that accrued depreciation may be determined according to one theory (such as limiting accrued depreciation to what an observer with poor eyesight can detect) and a reserve created by charges to operating expenses upon another basis (such as straight-line) has mental strabismus.

Credit has been claimed for the Consolidated Edison Company because it has built up a reserve, which not many years ago was less than 10 per cent of the book cost of the depreciable property, to about 20 per cent of the book cost of all property through charges to operating expenses. Probably credit should be given to the management for increasing the reserve even though it is still deficient, but the attempt to make present and future electric consumers bear the deficiency which should have been provided for long ago is inequitable and should not be recognized in fixing present rates. All differences of opinion as to the inadequacy of depreciation reserves could have been settled long ago had the Commission yielded to the argument that the deficiencies should be met by charging amounts to operating expenses far in excess of the rate at which depreciation is currently accruing.

As indicated above, the company included in electric operating expenses during the year ended September 30, 1948, $22,795,889, which is in excess of the amount which Mr. Goldthwaite's testimony fixed as the current rate at which depreciation is accruing by about $2,279,000. This difference is merely an attempt to make 1947-8 consumers provide the funds to build up the depreciation reserve beyond what they should be called upon to contribute.

In this memorandum the principles followed by the Commission in other rate and security cases have been followed.

While a comparison of the modified rate base with the adjusted operating income for the year ended September 30, 1948 might be made, it would be misleading so far as being a guide to action by the Commission. In arriving at the reported operating income, the company deducted $15,960,000 for federal income taxes. This amount is depressed by abnormal income deductions brought about

by the company's refinancing program in 1947 and reported losses in the gas department and its nonutility operations.

If such factors were eliminated and the taxable income of the electric department alone used in estimating the accruals for income tax purposes, the reported income tax charges of $15,960,000 would be increased to about $20,000,000. Upon this basis, the reported operating income would be reduced by $4,040,000 and the previously indicated income of $49,007,298.81 would be modified to nearly $45,000,000. This latter figure more nearly reflects the real income of the electric department for the year under study and represents a return of almost 8 per cent on the rate base of $566,000,000.

Under Section 114 of the Public Service Law, the Commission is empowered to fix temporary rates which will permit the company to earn not less than 5 per cent on the original cost of its property used and useful in the rendition of service less accrued depreciation. A 5 per cent return on a rate base of $566,000,000 is $28,300,000 and operating income of $45,000,000 would be excessive by over $16,000,000. If a 5½ per cent return were used, the excess would be nearly $14,000,000.

Regarding the method used above in arriving at the excess operating income after income taxes, attention may be called to the basis upon which the Consolidated Edison is asking for an increase in gas rates to the extent of $11,500,000 annually. The rate base there submitted by the company was the book cost of the gas property used and useful in the service of the public, less accrued depreciation purported to be according to testimony given by Mr. Goldthwaite, which is upon the same basis as that presented by him and used in this case. To the amount thus obtained, the company added their estimate of working capital and then showed that the rates which they proposed would, according to their computations, yield about 5 per cent upon such rate base. Consistent therewith *in that case*, the company used in its operating expenses the annual depreciation amount suggested by Mr. Goldthwaite, thus conforming to the same standard of consistency that the Commission has insisted as proper wherever depreciation, accrued and annual, is a factor. If this is a good standard in a case

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involving interim gas rate increases, why is it not a proper standard in a case involving temporary electric rate reductions?

Temporary Rates Standard

The Temporary Rates Law presents a somewhat different method of computing a rate base and to conform to that standard, Table 3 has been prepared to show the situation as of September 30, 1948. The only substantial difference between this table and the figures already presented is that the balance in the materials and supplies account at the end of this year has been substituted for working capital, the standard in the Temporary Rates Law being the original cost of property less the accrued depreciation. This would call for electric plant used and useful in the service of the public (Account 101) plus materials and supplies (Account 131) less accrued depreciation, which so far as this case is concerned is limited to Account 101.

The resultant figure rounded off is $558,000,000. If construction work in progress, including 85 per cent of common utility plant, were added of nearly $38,000,000, the total

Table 3. Estimated Rate Base, September 30, 1948

Electric plant in service	$734,541,722.79
Common utility plant in service (85 per cent)	49,628,974.15
Total plant in service	$784,170,696.94
Deduct:	
Reserve for depreciation of plant	
Electric	$150,163,540.79
Common (85 per cent)	11,461,518.27
Other deferred credits	1,500,000.00
Retirement work in progress—debits	
Electric	2,546,509.77
Common (85 per cent)	20,493.76
Total reserve—per books	$160,558,055.53
Deficiency in book reserve	95,500,000.00
Total adjusted depreciation	$256,058,055.53
Book cost less depreciation	$528,112,641.41
Contributions in aid of construction	61,114.79
	$528,051,526.62
Add:	
Materials and supplies	29,772,023.20
Total rate base	$557,823,549.82
Use	$558,000,000.00

would become $596,000,000 and at a 5 per cent return would call for about $30,000,000 in addition to operating expenses and all taxes. Compared with the modified income shown above of $45,000,000 indicates an excess of over $15,000,000.

Effect of Revenue and Income Taxes

At this point, a peculiar feature of the effect of income and gross earnings taxes upon rates in relation to operating income should be pointed out. In the cases in which *increased* rates have been involved, it has been contended that an increase in revenues merely to offset deficiencies below operating expenses and taxes *which have been paid* is insufficient because *increased* gross earnings and income taxes must be paid out of increased rates and do not leave a *net* increase in operating income sufficient to meet the actual charges which require the increased rates.

For example, take the case of a company which has had revenues barely sufficient to pay all operating expenses and taxes, including income and gross earnings taxes, and a fair return. If the company's operating expenses in the period for which rates are being fixed have increased $1,000,000 and rates are allowed *only* sufficient to provide additional revenues of $1,000,000, when there is deducted therefrom the gross earnings and income taxes amounting generally in a company of this size to over 40 per cent, there is left only $600,000 to apply toward increased costs of $1,000,000. In order to determine a proper amount to pay the additional taxes it is necessary to provide about $1,667,000. Then when 40 per cent has been paid, there is left about $1,000,000 which was the sum needed to provide additional costs. Thus the rates to be charged must be sufficient to increase revenues by $1,667,000.

When one comes to a case calling for *reduction* of rates, the reverse is true. If the facts show that a company had earnings of $1,000,000 in excess of a proper return after paying all of the operating expenses and taxes applicable to the period, the company can reduce rates $1,667,000, because its income and gross earnings taxes will be reduced about 40 per cent. Not having to pay earnings and income taxes of about $667,000, it will have operating income of only $1,000,000 less than it did have.

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The reasonableness of such a tax system is not before us. It may be said, however, that the Commission has repeatedly pointed out in various cases that the imposition of taxes upon utilities, whose rates are currently regulated and adjusted to produce a reasonable return, results in taxing the users of utility services. T..is is indirect taxation and when consumers pay the increased rates in a period of rising costs, they should remember that out of every dollar paid in increased rates, where the company is subject to payment of over 40 per cent in income and gross earnings taxes, 40 cents of the dollar goes not to the utility but to governmental bodies. In a period of declining rates, the converse is true and the government loses revenue because the utility has been earning excessive profits.

As the electric department of Consolidated Edison would be in the class paying 38 per cent federal income tax, 3½ per cent gross earnings tax to city and state, and 3⅓ per cent to the federal government for the electric energy tax, the total rate actually becomes 42.2 per cent. This means that if a company reduces rates, it will lose in net income only 57.8 per cent. Applying this ratio to the lowest figure produced in the above analyses of $14,000,000 would indicate possible rate reductions of some $24,200,000.

Applied to the total revenues from the sale of electric energy for the year ended September 30, 1948 (about $266,800,000), a reduction of 9 per cent could be required; but there is question whether all classes are entitled to a reduction.

In their testimony, the witnesses for the company and the staff of the Commission presented analyses and allocations to indicate to what extent the operating income of eight classes of consumers in 1946 showed an excess over operating expenses, depreciation and taxes (except federal income). Although they did not agree in amounts, they did agree that three groups had no excess, but a deficiency. These were street lighting, governmental (federal, state and city other than street lighting) and railroads. In the case of "other contracts", a small class, the company witness showed an appreciable deficiency and the staff of the Commission a small excess.

The two groups also agreed that four classes all showed excess above operating expenses, depreciation and taxes (except federal income), but differed considerably as to the amounts and percentages. These were residential (including religious), general, breadown and wholesale. The third is a small and not important class.

Although the testimony on this subject will be more fully reviewed in determining final rates, it is sufficiently clear to require the elimination of all but these four classes in any determination of temporary rates.

The grouping of service classifications and various other consumers into the eight classes referred to above is not easily identifiable with the rate schedules, but from reports filed with the Commission the total revenues for the year ended September 30, 1948, for all service classification can be obtained. It was slightly over $235,480,000. This amount excludes street lighting, sales to public authorities, other electric utilities and railroads, which in general are the classes that did not in 1946 earn operating expenses, depreciation and taxes.

The total includes over $20,000,000 attributable to the fuel surcharge established several years ago and changed from time to time as the price of fuel increases or decreases. In the costs for the year ended September 30, 1948, fuel was charged on an average cost basis, but obviously nothing was included for any increase in fuel prices in the future. As the cost of fuel increases, the fuel surcharge increases and any temporary reduction ordered at this time on a percentage basis should not affect the fuel surcharge. Whatever may be the disposition of this important matter in final rates, it is the theory of the present surcharge that the increase or decrease in the cost of fuel will be offset by an increase or decrease in rates in the form of the fuel surcharge. Assuming that the surcharge is allowed to continue under the general plan which has been operated for years, no change should now be made as the fuel surcharge will provide for changes in fuel prices.

In computing a percentage as the form of temporary rate reduction, these facts require that there be deducted from the total revenues for the classes of service considered as

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entitled to reductions the amount of the fuel surcharge levied in the year ended September 30, 1948 which somewhat exceeds $20,000,000. The revenues thereby obtained to which a reduction should be applied becomes about $215,000,000. Ten per cent of this amount is $21,500,000.

As pointed out in the previous pages, the consumption of electric energy has been increasing for many months at a considerable rate compared with the average in past years and the revenues therefrom have increased *per kilowatt hour* without any corresponding change in the rate schedules. This significant fact means that residential, industrial and commercial consumers, who have been paying the higher rates, have been increasing their consumption more than the other classes of customers who are billed under special rates. Whether this growth and this characteristic will continue is, of course, problematical, but it is a fact that there has been an increase of nearly 10 per cent in electric revenues for some time.

When considering this phase of the matter, it should be kept in mind that an appreciable reduction in the price of electricity and the very considerable increase in the price of gas will tend to accentuate the divergent trends of the two industries, to increase the use made of electricity, to decrease gas use and to make more certain that the trend in electric business will continue. Rate reductions almost invariably increase use.

There is one other important factor which may have an effect in the opposite direction. Arrangements are being made to bring natural gas to the residents of the metropolitan area. It has been informally stated that by so doing, the cost of rendering gas service to this district will be reduced by several millions of dollars and that the rates now considered necessary will decline. It is not expected that these plans will be in operation before the fall of 1950—possibly 1951—and no rates as of that date have yet been indicated by any of the gas companies.

Mention has been made of the fact that four classes of customers, not large in number but with revenues of $31,400,000 in the year ended September 30, 1948 are paying less than operating expenses, depreciation and taxes, ac-

cording to testimony by staffs of the company and the Commission. If, under a proper allocation of all elements, this should be found to be correct, the rates for these four classes should be materially increased, not only to pay the costs mentioned, but also to provide some return on the property. Assuming, for example, that such increases should amount to a *net* 10 percent, the revenues and operating income of the company would be increased $3,000,000, which is an important factor to be considered in determining final rates.

It is recommended that the Consolidated Edison Company be directed to place in effect not later than January 10, 1949, an amendment to its rate schedule providing for a decrease in rates of all service classifications, exclusive of the fuel adjustment charge, of 10 per cent to remain in effect until final rates are determined.

December 27, 1948.

Approved by the Commission Dec. 30, 1948.

EXHIBIT C

Opinion of the Appellate Division, Third Department, granting a stay of temporary rates pending the review proceeding (275 App. Div. 731)

Decided March 16, 1949

In the Matter of Consolidated Edison Company of New York, Inc., Appellant, against Milo R. Maltbie et al., Constituting the Public Service Commission of the State of New York, et al., Respondents

On December 30, 1948, the Public Service Commission made an order requiring petitioner, Consolidated Edison Company of New York, Inc., to make effective as of January 10, 1949, a temporary reduction in its filed rates for electric service to general consumers. The reduction is an "across the board" 10% reduction estimated to amount on a yearly basis to $21,500,000. On January 7, 1949, peti-

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tioner filed with the commission an application for a rehearing and for postponement of the effective date of the temporary rate, and on January 17, 1949, that application was denied. On January 17, 1949, petitioner instituted a proceeding under article 78 of the Civil Practice Act to review the commission's determination. That petition was returnable at the Albany Special Term of Supreme Court on January 26, 1949. At the same time there was returnable before the Special Term an application by petitioner for a stay of the temporary rate order pending the determination of the proceeding for review. The Special Term denied the motion for a stay and transferred the proceeding to this court for final disposition (193 Misc. 1015), and two orders carrying out these decisions were entered in the Albany County Clerk's Office on February 15, 1949. Petitioner appealed from the order denying the stay and that appeal has been argued before this court. It has also applied to this court for a stay. It appears that the order of the Public Service Commission in this proceeding will result in a reduction of the company's revenues from electric service of not less than $21,500,000 annually, and also in a reduction in operating income, for the same period, of not less than $12,427,000. It is worthy of note that the commission's final order was made, not during the hearings as to the rates to be fixed, but at the conclusion thereof at a time when the commission was in a position to have fixed permanent rates. In fixing the temporary rates the commission deducted $95,500,000 from the original cost less depreciation of the used and useful physical property of petitioner as shown on the company's books of account and in its verified reports, and $2,300,000 from the operating expense for depreciation accrual, likewise shown on the books of the company and in the reports. A serious question is presented as to whether or not the commission exceeded its statutory authority under section 114 of the Public Service Law in fixing the temporary rates. The Legislature has authorized the commission to fix temporary rates sufficient to provide a return of not less than 5% upon the original cost less accrued depreciation as shown

by the books and records of the company. It is only where such records are not available that the commission is permitted to estimate what such figures might be. In the instant case, although the facts needed have been furnished in the form required, they have been ignored by the commission to the extent that it has substituted its own estimate of the amount of depreciation based on a straight line formula for the actual figures as shown by the books of the company. If it be ultimately determined that the commission's act was *ultra vires* and void, it would seem to follow that any loss in operating income thereby incurred would constitute "great and irreparable damage" (Public Service Law, § 23, subd. 2) as a matter of law. We are informed that this loss will approximate $65,000 a day. The recoupment provisions of section 114 of the Public Service Law were designed to furnish a method whereby the permanent rates ultimately adopted might reflect the difference, if any, between such permanent rates and the temporary rates yielding 5% on the company's own figures. This difference must, by necessity, be small if the directives of the statute are adhered to. These provisions were not designed and are not adequate to meet the situation herein presented where the loss, if the order is void, may well reach astronomical figures. The very magnitude of the sums involved is also clearly indicative of the "great and irreparable damage" this petitioner may suffer, both as to reduction of current income in the face of increased operating costs and expanding facilities and as to its adverse effect on necessary company financing as disclosed by the evidence. The application for a stay *pendente lite* is granted for the reasons set forth above, and otherwise stated in the moving papers, from which it presumptively appears to the court that great and irreparable damage will otherwise result to the petitioner. The order to be entered hereon shall contain appropriate provisions as to the security to be given by the petitioner. Present—Foster, P. J., Heffernan, Brewster, Deyo and Santry, JJ.

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EXHIBIT D

Opinion of the Court of Appeals reversing the stay order (299 N. Y. 172)

Decided April 20, 1949

In the Matter of Consolidated Edison Company of New York, Inc., Rsepondent, against Milo R. Maltbie et al., Constituting the Public Service Commission of the State of New York, Appellants

Loughran, *Ch. J.*

The parties to this article 78 proceeding are the Public Service Commission of the State and Consolidated Edison Company of New York, Inc., a gas and electric corporation subject to the Public Service Law. Pursuant to section 114 of that statute, the Commission on December 30, 1948, fixed temporary rates to be charged by the company for electric service supplied to its consumers. Enforcement of that order of the Commission has been stayed by an order of the Appellate Division which is now before us for review upon the following questions certified:

"1. Does the order [for a stay] as granted contain the requisite specific findings required by subdivision 2 of section 23 of the Public Service Law to justify the stay?

"2. Do the facts found in the order as granted constitute great and irreparable damage within the meaning of those terms, as used in subdivision 2 of section 23 of the Public Service Law?"

Section 23 requires that an order suspending an order of the Commission fixing rates "shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great and irreparable damage would otherwise result to the petitioner and specifying the nature of the damage" (subd. 2). The stay in question was granted by the Appellate Division, because in

the judgment of that court there were serious questions as to whether the Commission in fixing the temporary rates had exceeded the powers conferred upon it by section 114 of the Public Service Law, and because the rate provisions of that section, as read by that court, "were not designed and are not adequate to meet the situation herein presented where the loss, if the [temporary rate] order is void, may well reach astronomical figures." (275 App. Div. 731, 732.)

The answer to these misgivings is to be found, we think, in the construction which this court put upon section 114 in *Matter of Bronx Gas & Elec. Co.* v. *Maltbie* (271 N. Y. 364, 375). Section 114, we there said, "forces the Public Service Commission to consider the returns from the temporary rate and to establish the permanent rate, or the final rate, accordingly; that is, if the temporary rate has proved to be too low the final rate must make it up to the company. Over what time it is necessary to provide a rate sufficient to make up the loss, or to include the take-up, is a matter of adjustment, machinery and method. These matters are all in the hands of the Public Service Commission, which may increase or modify a rate to meet the circumstances at any time."

The recoupment proviso of section 114 is applicable to the temporary rates here in question. Hence, "great and irreparable damage" cannot result to the company from the temporary rate order, notwithstanding the Commission made its own estimate of the depreciation of the used and useful physical property of the company instead of accepting the figures shown on the company's records. Hence, too, the magnitude of the sums that the company may be entitled to recapture does not demonstrate either the existence of "great and irreparable damage" or the inadequacy of the recoupment proviso of section 114 (see *Staten Is. Edison Corp.* v. *Maltbie*, 292 N. Y. 611).

The order should be reversed, with costs and the motion for a stay denied. The questions certified are answered in the negative.

Lewis, Conway, Desmond, Dye, Fuld and Bromley, JJ., concur.

Order reversed, etc.

EXHIBIT E

Majority and dissenting opinions of the Appellate Division, Third Department, in the review proceeding under Article 78 (275 App. Div. 475).

Decided June 28, 1949

In the Matter of Consolidated Edison Company of New York, Inc., Appellant, against Milo R. Maltbie et al., Constituting the Public Service Commision of the State of New York, et al., Respondents.

Santry, *J.* On May 29, 1946, the Public Service Commission, on its own motion, instituted a proceeding to investigate and determine whether the rates and charges of Consolidated Edison Company of New York, Inc., for electric service are unjust and unreasonable, and if so found, to fix and determine just and proper rates and charges for such service. Hearings were had and testimony taken from time to time up to the 2d day of December, 1948, when the record was closed.

On December 30, 1948, the commission made the order under review, by which it fixed and established temporary rates for electric service, effective until final rates are established, by providing for a 10% reduction across the board in the rates charged by the company on the date of the order. The company petitioned for a rehearing and a postponement of the effective date of the temporary rates, which was January 10, 1947 [sic. 1949]. The application was denied, and on January 18, 1949, the company brought this proceeding in the Supreme Court, Albany County, for a review of the commission's order and determination under article 78 of the Civil Practice Act. The proceeding was transferred by order of the Special Term to this court for disposition on the merits.

The issues presented by the petition, the answer and the reply involve an interpretation of the provisions of section 114 of the Public Service Law, pursuant to which the commission is authorized to fix temporary rates. The pro-

visions of this statute, so far as applicable here, are as follows:

"§ 114. *Temporary rates.*

"To facilitate prompt action by the Commission in proceedings involving the reasonableness of the rates of any public utility and to avoid delay in any such rate proceeding, the commission is hereby authorized to require any public utility company to establish, provide and maintain continuing property records including a list or inventory of all of the physical property actually used in the public service, and to require any public utility company to keep its books, accounts and records in such manner as to show currently the original cost of said physical property and the reserves accumulated to provide for the retirement or replacement of said physical property.

"The commission may, in any such proceeding, brought either on its own motion or upon complaint, upon notice and after hearing, if it be of opinion that the public interest so requires, immediately fix, determine and prescribe temporary rates to be charged by said utility company pending the final determination of said rate proceeding. Said temporary rates so fixed, determined and prescribed shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical property of said public utility company used and useful in the public service, and if the duly verified reports of said utility company to the commission do not show the original cost, less accrued depreciation, of said property, the commission may estimate said cost less depreciation and fix, determine and prescribe rates as hereinbefore provided."

It is not disputed that the company maintained continuing property records, and that it kept its books in such a manner as to show currently the original cost of its physical property and the reserves accumulated to provide for the retirement or replacement of said physical property, and that such books and records set forth these items in such amounts as were determined by the judgment and accounting practice used by the management of the company. It

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is also conceded that the company filed with the commission verified quarterly reports, on forms *furnished by the commission*, containing all of this information as shown on the books and records of the company.

Without going into detail and using approximate round figures, is is sufficient to point out that in the verified report of the company for the quarter ending September 30, 1948, the amount set forth for original cost of physical property less depreciation reserves, was $653,000,000. In arriving at this figure the amount deducted for depreciation was $160,000,000. In determining the base for fixing the temporary rates the commission accepted the book figures of the company as contained in this report, excepting only the item of depreciation. On this item the commission added to the amount of depreciation shown in the report the sum of $95,000,000, with the result that the original cost of the physical property less depreciation, as fixed by the commission, was reduced to $558,000,000. Computed on a net physical property valuation of $558,000,000, as fixed by the commission, the temporary rates, based on the amount of electric service sold during the base year ending September 30, 1948, would produce a return of more than the 5% provided by statute, but computed on the valuation of $653,000,000 shown on the books of the company, the return would be only 4.63%.

The company contends that the commission had no power or authority to estimate the original cost of the physical property less accrued depreciation for the purpose of fixing a base for computing the 5% minimum return, but was required to take the book figures of the company as shown in its quarterly reports to the commission. It further contends that the act of the commission in making such estimate was *ultra vires*, and that the temporary rates based thereon are illegal and void.

The Public Service Commission was created by statute and it may exercise only such powers as are conferred upon it by the Legislature. The Legislature has the right to delegate to the commission the power to perform certain duties, but the commission can act only within the scope of the power so delegated, either expressly or by necessary implication. (*Matter of the Village of Boonville* v. *Maltbie*,

272 N. Y. 40; *Matter of the City of Syracuse* v. *Gibbs*, 283 N. Y. 275.) In the exercise of the powers thus conferred, the commission is required to act within the framework of the statute, both as to the authority granted and the limitations imposed. The sole authority of the commission to fix temporary rates is contained in the provisions of section 114 of the Public Service Law. The problems presented on this review require an interpretation of the meaning of the provisions of that section.

In interpreting the provisions of a statute the language used should be given the usual and ordinary meaning, read in the light of the purpose sought to be accomplished by the act. (*Cooper Snell Co.* v. *State of New York*, 230 N. Y. 249; *Matter of Brooklyn Edison Co.* v. *Davidson*, 269 N. Y. 48; *Wiley* v. *Solvay Process Co.*, 215 N. Y. 584.) The headline to section 114 is "Temporary rates". This indicates that the entire statute is designed to apply to that subject only, and that all of its provisions are integrated and must be considered together. The opening sentence of the text indicates that the purpose of the statute is to facilitate prompt action and avoid delay in rate proceedings, and to that end it provides that the commission may require any utility company to maintain continuing property records and to keep its books, accounts and records in such a manner as to show currently the original cost of its physical property and the reserves accumulated to provide for the retirement or replacement thereof.

It next authorizes the commission to fix temporary rates when in its opinion public interest so requires. Then, for the protection of the public utility, it provides that such temporary rates should be sufficient to produce a return of not less than 5% upon the original cost, less accrued depreciation, of the physical property used and useful in the public service. This last provision, read in conjunction with the provisions in the preceding paragraph of the statute relative to the requirement that the utility company keep books and records to show original costs and accumulated reserves, clearly indicates that the Legislature intended that the base figure on which the 5% minimum return was to be computed, should be determined by taking the valuations

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placed on the items involved by the utility company in the regular course of its business and in accordance with the business judgment and accounting practice adopted by the management.

By these provisions of the statute the Legislature has provided a quick and reasonably accurate method of fixing the minimum return under a temporary rate by the use of figures that can be readily obtained by reference to the books and records of the company. As was said by Judge Crane in *Matter of Bronx Gas & Electric Co.* (271 N. Y. 364, 373): "At least there is some accuracy in these figures; they can be fixed with some certainty and are not dependent altogether upon speculative expert opinion."

Finally, the Legislature, anticipating that cases might arise where, through failure to follow prescribed accounting practices, the duly verified reports to the commission would not show the factors of original cost and accrued depreciation, or one of them, provided that in such cases the commission be empowered to estimate as to either of these factors not shown. In the case at bar the reports of the company did show original cost and the amount of depreciation it had accrued on its books as the same had been determined and set up by the company in the regular course of business, and if the accounting practices involved were faulty or inadequate the commission had long had full jurisdiction to investigate and modify in a proper proceeding. (Public Service Law, § 66, subds. 9, 11.)

The commission appears to contend that the term, "accrued depreciation," as used in the statute, means depreciation which is adequate in amount, and that whenever in the opinion of the commission the depreciation set up on the books and records of the company is inadequate, the commission is empowered to resort to an estimate. There is nothing to support this contention, either in the language of the statute or in the purpose for which it was enacted. The statute deals only with temporary rates. It has no application to permanent rates. The essential elements, in the judgment of the Legislature, necessary for fixing temporary rates, are prompt action, factual information readily ascertainable from proper records, and a reasonable

return fixed at not less than 5%. The phrase, "accrued depreciation," used in the second paragraph of the statute, is tied in with the phrase, "reserves accumulated to provide for the retirement or replacement of said physical property," contained in the first paragraph, and the two phrases must be read together. Thus treated it becomes evident that the Legislature is referring to the same thing by both phrases.

To permit the commission to resort to an estimate whenever in its judgment the amount of accrued depreciation as set up and carried on the books of a utility company is insufficient would destroy the whole pattern of section 114.

The determination of the proper amount to be charged for depreciation of property is one of the most troublesome problems in the field of accounting. More than a half dozen recognized methods of computing depreciation are in use by accountants. If all of these methods were applied to the same problem as many different results would be produced as there were methods employed. If the contention of the respondents were sustained the commission could always resort to an estimate by the simple expedient of adopting a method of computing depreciation which would produce an amount in excess of that produced by the method used by the utility. In result this would be the grant of an arbitrary power to determine the temporary rate. The Legislature neither contemplated nor provided for such a result.

In his memoranda accompanying the order under review, the chairman of the commission states that reported book figures without modification are not the proper basis for determining temporary rates. It is not the function of the commission or of the courts to decide what basis is proper for the fixing of temporary rates. That function belongs to the Legislature alone, and it could prescribe any basis which in its judgment it deemed proper and suitable. We are not concerned here with what the Legislature could or should have done. We are concerned only with what it actually did.

It has been suggested that because the recoupment clause contained in the third paragraph of section 114 provides for the restoration, through the permanent rate, of any loss

which the company might suffer through the imposition of inadequate temporary rates, the company should not be heard to complain because the temporary rates under review were not fixed in accordance with the requirements of the statute. The recoupment provision has no such effect. In the first place, it is designed to provide for the adjustment of rates legally imposed. In the second place, the power to grant restoration cannot confer upon the commission in the imposition of a rate, powers which the Legislature has withheld, nor give it a free hand to ignore the limitations of the statute. The commission was without authority to fix temporary rates except in conformity with the provisions of the law. Recoupment could no more legalize an illegal rate than in the field of criminal law could the restoration of stolen property legalize the larceny by which it was taken.

One other matter merits brief comment. During the base year the company, under a directive of the commission, had charged to operating expense an item of $22,795,888, for depreciation on its electric properties. In computing the company's return on its operations under the temporary rates imposed, the commission deducted the sum of $2,279,000 from this item of depreciation as charged on the books of the company, thereby automatically increasing its operating income by the amount of the deduction. Thus increased, the income return would be substantially advanced toward the 5% minimum provided by statute. The reason assigned for the action was that the $95,000,000, added to accrued depreciation on the commission's estimate, increased the depreciation account to such an amount that the annual additions to this account out of operating expenses should be reduced, and on the opinion of an expert, the commission fixed the reduction at $2,279,000. There is no power or authority conferred upon the commission to justify such action in connection with the fixing of temporary rates, or in computing the return to the company under such rates.

The commission acted beyond its powers and authority in estimating the cost, less accrued depreciation, of the company's physical property. Its acts in fixing the temporary rates were *ultra vires*, illegal and void. The commission's order of December 30, 1948, should be annulled and set aside.

FOSTER, *P. J.* (dissenting):

I accept the conclusion that the phrase "accrued depreciation," used in the second paragraph of the statute, is tied in with the phrase, "reserves accumulated to provide for the retirement or replacement of said physical property", contained in the first paragraph, and that the two phrases must be read together. The commission, itself, evidently so concluded because it accepted the amount of reserves set up for depreciation as indicating in part the extent of accrued depreciation. Nevertheless, I do not think that the commission was bound to accept at their face value the figures shown on the verified reports of the utility company. The statute reads in part—" * * * and if the duly verified reports of said utility company * * * do not show the original cost, less accrued depreciation, of said property, the commission may estimate said cost less depreciation * * *". It hardly seems probable to me that the Legislature intended the word—"show"—to have a literal and rigid interpretation. If that were so, a utility company could put any figures on its report to indicate accrued depreciation and the commission would be obliged to accept them. Obviously, this cannot have been the legislative intent, and hence it seems to me that the matter enters into the realm of a factual situation where an issue is presented as to whether the reports do actually show accrued depreciation. This is a question of fact and the evidence in the record on this issue is conflicting. Hence the commission in the exercise of its administrative and *quasi-judicial* powers had the right to determine such issue, and since there is substantial evidence to sustain its determination we have no authority to interfere. The alternative to this would be to say we have the power, despite the conflicting evidence in the record, to say that the reserves set up for depreciation indicate with substantial accuracy the amount of accrued depreciation. As I view the matter, we have no such power.

The determination of the commission should be confirmed.

Brewster, Deyo and Bergan, JJ., concur with Santry, J.; Foster, P. J., dissents, in a memorandum.

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The decision of this court is stayed for a period of ten days after the entry of an order herein during which time the respondent may, if so advised apply to the Court of Appeals or to a judge thereof for a further stay pending an appeal to that court.

Order of the Public Service Commission, dated December 30, 1948, annulled on the law, with $50 costs and disbursements.

EXHIBIT F

Opinion of the majority of the Court of Appeals reversing the opinion of the Appellate Division (300 N. Y. 196).

Decided December 29, 1949

In the Matter of Consolidated Edison Company of New York, Inc., *Respondent*, against Milo R. Maltbie, et al., Constituting the Public Service Commission of the State of New York, et al., *Appellants*

Fuld, *J.*:

This appeal, taken as of right by the Public Service Commission, requires review of a nonunanimous order of the Appellate Division, Third Department, annulling an order of the commission which fixed temporary rates for electricity supplied by the Consolidated Edison Company of New York, Inc., within the City of New York. In fixing temporary rates, the commission purported to act under the authority of section 114 of the Public Service Law, and whether or not it acted in conformity with that statute, is the question presented in this article 78 proceeding.

Section 114, added to the Public Service Law in 1934 (L. 1934, ch. 287), reads as follows:

"To facilitate prompt action by the commission in proceedings involving the reasonableness of the rates of any public utility and to avoid delay in any such rate proceeding, the commission is hereby authorized to require any public utility company to establish, provide and maintain continuing property records, including a list or inven-

tory of all of the physical property actually used in the public service, and to require any public utility company to keep its books, accounts and records in such manner as to show currently the original cost of said physical property and the reserves accumulated to provide for the retirement or replacement of said physical property.

"The commission may, in any such proceeding, brought either on its own motion or upon complaint, upon notice and after hearing, if it be of opinion that the public interest so requires, immediately fix, determine and prescribe temporary rates to be charged by said utility company pending the final determination of said rate proceeding. Said temporary rates so fixed, determined and prescribed shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical property of said public utility company used and useful in the public service, and if the duly verified reports of said utility company to the commission do not show the original cost, less accrued depreciation, of said property, the commission may estimate said cost less depreciation and fix, determine and prescribe rates as hereinbefore provided.

"Temporary rates so fixed, determined and prescribed under this section shall be effective until the rates to be charged, received and collected by said utility company shall finally have been fixed, determined and prescribed. The commission is hereby authorized in any proceeding in which temporary rates are fixed, determined and prescribed under this section, to consider the effect of such rates in fixing, determining and prescribing rates to be thereafter charged and collected by said public utility company on final determination of the rate proceeding."

In May of 1946, the commission, on its own motion, instituted an investigation into all of the rates charged by the Consolidated Edison Company. Hearings begun in June, 1946, continued from time to time over a two and a half year period, until December, 1948. On the last day of the actual hearing, the chairman of the commission, who was presiding, announced that the commission was considering the adoption of a temporary rate order. Over the com-

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pany's protest, the commission on December 30, 1948, entered the order, here under review, that there be a 10% reduction in the total charges made to every consumer for electric service in specified service classifications. The temporary rates, expressly made effective "until final rates are determined", were calculated to accomplish a gross reduction to customers of $21,500,000, which, after adjustment for reduced taxes, is equivalent to a reduction of $12,427,000 in the company's net income.

On a prior appeal recently before us, we held that, in view of the recoupment provisions of section 114, the alleged failure of the commission to follow the requirements of the statute did not warrant an injunction against the enforcement of its order pending appeal, and we accordingly reversed an order of the Appellate Division that granted a stay. See *Matter of Consolidated Edison Co.* v. *Maltbie*, 299 N. Y. 172; see, also, *Matter of Bronx Gas & Elec. Co.* v. *Maltbie*, 271 N. Y. 364.) As a result of that decision, the temporary rates went into operation as of January 10, 1949, and, although the Appellate Division thereafter annulled the commission's order, they continue in effect down to the present through stays of that court's decision pending our review. As indicated, following consideration of the commission's determination on the merits, the Appellate Division concluded that the commission had failed to comply with those requirements of section 114 which prescribe the manner of fixing temporary rates.

The company's threshhold contention that, since the hearings on the rate investigation had been closed, the commission was *functus officio* and, by that token, without power to make a temporary rate order, requires but short answer. (And see *Matter of Consolidated Edison Co.* v. *Maltbie, supra*, 299 N. Y. 172.) The legislature made it exceedingly clear that the commission is authorized to fix temporary rates "pending • • • final determination" of a permanent rate proceeding if the commission be "of opinion that the public interest so requires" (§ 114, 2d par.). The time limitation implicit in the statute is that temporary rates can be imposed only after a permanent rate proceeding has been commenced and before its final determination. As the legislature undoubtedly appreciated,

the facts which make possible a temporary rate order—or the considerations which point to its propriety—may not be adduced or brought to the commission's attention until the final stages of the proceeding, for such proceedings do not follow any set or prescribed course. And, beyond that, the legislature must also have realized, considerable time, even after the hearings are closed and the record made, may frequently be required for ultimate determination of the very complicated rate problem presented.

The principal contention advanced by the company is that the commission violated the mandate of the statute that the temporary rates be fixed and determined so as to yield a return of not less than 5% "upon the original cost, less accrued depreciation, of the physical property of said public utility company used and useful in the public service" (§ 114, 2d par.).

There is no question that the commission attempted to fix the rates in just the way described and, if the commission's method in ascertaining the amount of accrued depreciation be correct, there is also no question that the result complies with the requirements of the statute. In arriving at its result, the commission found the original cost of the property, as shown on the company's books, to be $813,000,000, from which it deducted $255,000,000, as representing accrued depreciation. This latter sum was made up of $160,000,000, which was the amount carried on the company's books as reserve for depreciation plus an additional sum of $95,000,000, which an engineer employed by the commission testified, was the amount of the deficiency in that reserve. The inclusion of this additional sum is justified by the commission upon the ground that the books of the company "do not show" the amount of accrued depreciation and that, by reason thereof, the commission was authorized by the second paragraph of section 114 to proceed to make its own "estimate" of the accrued depreciation.

The Appellate Division held that the expression, "accrued depreciation", used in that second paragraph of section 114, refers "to the same thing" as the expression, "the reserves accumulated to provide for the retirement or replacement of said physical property", contained in the

first paragraph; that the latter phrase relates to the amount actually carried by the company on its books for the purposes specified; and that, since the books did "show currently" the amount of such accumulated reserves—namely, $160,000,000—the commission was required to use that figure as the amount of "accrued depreciation" and could not undertake to make its own estimate.

In the literature of accounting, including public utility accounting, the term, "accrued depreciation", is by no means synonymous with the term, "reserves accumulated to provide for the retirement or replacement of • • • property." Phrased somewhat differently, the retirement reserve was—under the accounting practice followed generally by electric utility companies until recent years—designed primarily as a reserve for the equalization of retirements as required from time to time and was not intended to reflect or represent accrued depreciation. (See, e. g., *Matter of New York Edison Co.* v. *Maltbie*, 244 App. Div. 685, 691, affd. 271 N. Y. 103; see, also, National Association of Railroad and Utility Commissioners, *Report of Committee on Depreciation* [1943], pp. 4-7.) Certainly, in fixing permanent rates, the amount of accrued depreciation would have to be ascertained, and the reserves shown on the books, no matter how denominated, would not be controlling. (See, e. g., *People ex rel. Consolidated Water Co.* v. *Maltbie*, 275 N. Y. 357, 368-369, affg. 245 App. Div. 866; *Matter of Long Island Lighting Co.* v. *Maltbie*, 249 App. Div. 918; cf. *Federal Power Comm.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 597-598, 606-607.)

It is strongly urged, however, that whatever these terms—accrued depreciation and reserves accumulated for retirement or replacement of property—may mean in other contexts, to draw a distinction between them in the present context would be to distort the legislative design. In making a temporary rate order, expedition and promptness and the ready availability of factual information are prime requisites. In other words, the argument runs, the legislature determined that, in computing temporary rates, reliance should be placed only upon the facts and figures readily disclosed by the company's books, since they had

at least the virtue of definiteness in contrast to the uncertainty that would stem from the traditional use of speculative and varying expert opinion. (See *Matter of Bronx Gas & Elec. Co.* v. *Maltbie, supra,* 271 N. Y. 364, 372-373.)

These considerations are indeed weighty and may not be minimized. They would, in our view, be conclusive if the commission had the authority to require that the reserves accumulated and shown on the books reflect correctly the accrued depreciation of the property. But we look in vain for such authorization. On the contrary, the commission has twice endeavored to prescribe the method of setting up depreciation reserves and twice have those attempts been held to be beyond the powers conferred upon the commission. (See *Matter of New York Edison Co.* v. *Maltbie, supra,* 271 N. Y. 103, affg. 244 App. Div. 685; *People ex rel. New York Rys. Co.* v. *Public Service Comm.*, 223 N. Y. 373; see, also, 1 Report of Commission on Revision of Public Service Commissions Law [1930], p. 128; cf. *Matter of Rochester Gas & Elec. Corp.* v. *Maltbie,* 298 N. Y. 867.) It is true that this court, in affirming the determination in the *New York Edison Company* case, pointed out that the commission could have elicited from the companies there involved the information sought "by directions of the Commission that would have been open to none of the objections to its present orders" (271 N. Y., at p. 112). The very objection that was there urged by the companies and upheld as valid by the court, however, was that the commission could not compel the companies to set up their reserves on the basis of such information.

The result, therefore, is that, although the commission is empowered to obtain the information as to the amount of accrued depreciation and to require that such information be preserved somewhere in the books and records of the company, the commission lacks the power to require the company to accumulate reserves in any amount other than as the company's own judgment dictates. The reserves accumulated, as "shown currently" on the books, pursuant to the first paragraph of section 114, would consequently continue to be the amount decided upon by the company in the exercise of its own unfettered judgment and not subject to correction by the commission.

It challenges reason to suppose that the legislature purposefully required that the commission accept willy-nilly the company's figures on depreciation regardless of how incorrect or inaccurate they might be. "If that were so," as Presiding Justice Foster stated in the course of his dissenting opinion below, "a utility company could put any figures on its report to indicate accrued depreciation and the commission would be obliged to accept them. Obviously, this cannot have been the legislative intent". (275 App. Div. 475, 483.) While it may be impossible "completely to fathom the legislative mind" (*People ex. rel. New York Central & H. R. R. R. Co.* v. *Public Service Comm.*, 227 N. Y. 248, 257), it is safe to venture that the legislature could not have intended that the commission be treated merely as a clerk making purely mathematical computations. (Cf. *United States* v. *Morgan*, 313 U. S. 409, 415.)

There is certainly nothing in either the express language or the general design of the statute which compels such a result. On the contrary, recognition can be given to the fact that the expressions in the two paragraphs—reserves accumulated and accrued depreciation—are obviously related without forcibly substituting the one for the other. Indeed, such substitution produces illogical and unintended consequences. For example, if the term, "accrued depreciation", were substituted for the phrase in the first paragraph of section 114, "reserves accumulated to provide for the retirement or replacement" of property, the paragraph would authorize the commission to require utility companies to show currently on their books the accrued depreciation of their property, contrary to the decision in the *New York Edison Company* case (244 App. Div. 685, aff'd. 271 N. Y. 103). Similar consequences would follow if the phrase in the first paragraph were substituted for the term "accrued depreciation", contained in the second paragraph. The relationship between the two terms is given effect if it be presumed, as would ordinarily be the case, that, for the purposes of a temporary rate order, the reserves accumulated for retirement or replacement, as shown on the books, represent the accrued depreciation specified in the second paragraph—for such reserves unquestionably

constitute some evidence of accrued depreciation. But this presumption is not made conclusive.

In a case such as the present, where a witness for the commission has testified that the figure for accrued depreciation is $95,000,000 more than the reserve accumulated by the company on its books and a witness for the company itself has indicated that the actual depreciation exceeded the book reserve by some $40,000,000, the commission need not blind itself to the fact that the reserve so accumulated upon the company's books does not—as reasonable men would use the word—"show" the accrued depreciation. The commission was authorized, therefore, to make an estimate of that item. In the light of the evidence adduced, it may not be said that its figure of $255,000,000 was without support. While other and variant figures were in the record, the courts will not and cannot assume that the commission failed to consider them in reaching its estimate, which concededly was not a final determination.

The construction which we have placed upon the statute impresses us as being more in accord with the legislative design, more reasonable and fair, than alternative interpretations. It gives full play to all of the statutory prescriptions and is consistent with all of its objectives. Expedition and promptness will be achieved, for reliance will continue to be placed upon the amount accumulated by the company rather than upon an estimate by the commission, except where the former is known to be misleading. In the latter case, substitution of a more accurate figure would seem to be demanded if meaning is to be given to the statutory direction that "the effect" of temporary rates is an element to be weighed and considered in determing permanent rates. (Public Service Law, § 114, 3d par.; see *Matter of Bronx Gas & Elec. Co.* v. *Maltbie, supra,* 271 N. Y. 364, 375.) The value of experience under temporary rates is naturally increased in proportion to the correspondence between the rate base for such temporary rates and the base for permanent rates. And, finally, if a temporary rate order is made within the framework of section 114—as it here was—the recoupment provisions of that section apply to prevent any injustice or prejudice to the company even if the temporary rate fixed is later

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found to have been placed at too low an amount. (See *Matter of Consolidated Edison Co.* v. *Maltbie, supra,* 299 N. Y. 172; *Matter of Bronx Gas & Elec. Co.* v. *Maltbie, supra,* 271 N. Y. 364.)

The order of the Appellate Division should be reversed and the determination of the Public Service Commission confirmed, with costs in this court and in the Appellate Division.

Loughran, Ch. J., Lewis, Desmond and Bromley, J. J., concur with Fuld, J.; Conway and Dye, JJ., dissent and vote to affirm on the opinion of Justice Santry at the Appellate Division.

Order reversed, etc. [See 300 N. Y. 645.]

EXHIBIT G

Memorandum of the Court of Appeals denying reargument and amending the remittitur (300 N. Y. 645).

Decided January 13, 1950

In the Matter of Consolidated Edison Company of New York, *Respondent,* against Milo R. Maltbie, et al., Constituting the Public Service Commission of the State of New York, et al., *Appellants.*

Motion for reargument denied. Motion to amend the remittur granted. Return of remittur requested and, when returned, it will be amended by adding thereto the following: Questions under the Federal Constitution were presented and passed upon by this court, viz., whether section 114 of the Public Service Law of the State of New York and the order of the Public Service Commission, dated December 30, 1948, in Case No. 12455, made pursuant thereto violated any of the rights of the respondent guaranteed by section 1 of the Fourteenth Amendment to the Federal Constitution. This court held that the aforesaid statute and order of the commission did not violate any of the rights of the respondent guaranteed by that provision of the Federal Constitution. [See 300 N. Y. 196.]

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MAY 18 1950
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1949

No. 824

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

against

MILO R. MALTBIE, NEAL BREWSTER, MAURICE C. BURRITT, GEORGE A. ARKWRIGHT and SPENCER B. EDDY, constituting the Public Service Commission of the State of New York, and the PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM APPEAL

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 824

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

against

MILO R. MALTBIE, NEAL BREWSTER, MAURICE C. BURRITT, GEORGE A. ARKWRIGHT and SPENCER B. EDDY, constituting the Public Service Commission of the State of New York, and the PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM APPEAL

Opinions Below

The opinion of the Appellate Division of the Supreme Court of the State of New York (Foster, P. J., dissenting), annulling the order of the New York Public Service Commission which prescribed temporary rates for the appellant's electric service, is reported at 275 App. Div. 475. The opinion of the Court of Appeals of the State of New York (Conway and Dye, JJ., dissenting), reversing the decision of the Appellate Division and reinstating the order of the Commission, is reported at 300 N. Y. 196. A memorandum opinion of the Court of Appeals, denying appellant's motion for reargument and amending the Court's remittitur, as requested, is reported at 300 N. Y. 645.

Jurisdiction

Appellant has complied with Paragraph 1 of Rule 12 of the Rules of this Court, and has filed a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction upon appeal. The controversy involves the validity and constitutionality, under Section 1 of Amendment 14 of the United States Constitution, of Section 114 of the Public Service Law of the State of New York, as construed and applied in the instant case, and an order of the Commission made on December 30, 1948, under that statute, prescribing temporary rates for electric service. Appellant contends that the New York Court of Appeals erred in sustaining the validity and constitutionality of the statute and order in question.

Specification of Errors

Appellant adopts, for its specification of errors, the points contained in its assignment of errors filed in this Court.

Statement and Summary of Argument

The so-called "temporary" rates involved in this case were prescribed by the New York Commission more than sixteen months ago. They were established by means of an "across the board" reduction of ten per cent in all the rates (exclusive of fuel surcharge) theretofore charged by the appellant for general electric service, under various service classifications, to its more than 2,300,000 customers in the metropolitan area of New York City.

The reduction was calculated by the Commission* to be in gross not less than $21,500,000 a year, and in net (after

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* It will be convenient sometimes to refer to the appellant as "the Company", and to the appellees as "the Commission".

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income and gross revenue taxes) not less than $12,427,000. The Commission itself has declared the reduction to be *"the largest single reduction in the history of New York utilities."* (Ann. Rep. N. Y. P. S. C., 1948, p. 14. Italics in original.)

The order of the Commission was made on December 30, 1948, and the prescribed rates became effective on January 10, 1949. Although all of the evidence necessary to be considered by the Commission in determining permanent rates was before it in a record closed on December 2, 1948, a decision on such rates has not yet been announced.

Thus, the peremptory temporary rate reduction has been in effect for more than sixteen months, and, without having made a single finding on any of the evidence before it on the basic issues of depreciation and rate of return, the Commission has required this appellant to forego revenues since January, 1949, aggregating about $30,000,000 and increasing with every day that final action is deferred.

Moreover, when the Commission undertook to make a temporary rate order, after the record had been closed, it was not confronted with a situation where a utility had stubbornly withheld rate reductions to customers. On the contrary, while rate proceedings were going on, the Company put into effect, *on a permanent basis,* electric rate reductions aggregating $15,100,000 per year (R. 26-27).*

The rate proceeding before the Commission began on May 29, 1946. In the course of the many hearings in this proceeding over the ensuing period until December, 1948, evidence was introduced in behalf of the Company, the Commission and several intervenors, relating to various factors to be considered by the Commission in determining just and reasonable permanent rates. Transcripts from

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* Record references are those in the Record on Review and Appeal in the Court of Appeals.

the books of accounts and records of the Company kept in the ordinary course of business and in conformity with the accounting regulations prescribed by the Commission, as well as the duly verified reports made by the Company to the Commission in the form and containing the data required by the Commission's orders, were also received in evidence (R. 6106, 6107). At the concluding hearing on December 2, 1948, no party to the proceeding indicated the need for additional hearings or evidence on the question of permanent rates. The case was, accordingly, "closed" on the record (R. 6112).

However, the Commission, asserting that it would take "several months" to settle the controversial questions before it, resorted to the device of fixing temporary rates under Section 114 of the New York Public Service Law. That section of the Public Service Law (N. Y. Laws of 1934, ch. 287) empowers the Commission to require public utilities to maintain continuing property records and books, accounts and records showing the original cost of physical property and the reserves accumulated to provide for the retirement or replacement of such physical property, and further empowers the Commission, in a proceeding "involving the reasonableness of the rates of any public utility," to "immediately fix" temporary rates to be charged by a utility company pending the final determination of the rate proceeding. The statute requires that the temporary rates "shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical property of said public utility company used and useful in the public service". Under the concluding paragraph of the statute, sometimes referred to as the "recoupment" provision, the Commission is authorized "to consider the effect" of the temporary rates in prescribing just and reasonable permanent rates.

The temporary rate procedure, from its inception, had been recognized as an emergency measure to insure the

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speedy adjustment of utility rates in periods of depression (see Governor Lehman's statement in approving Section 114, quoted *post*, at pp. 30-31; Barnes, Temporary Rates in Utility Regulation, 34 Ill. L. Rev. 929; Note, 46 Yale L. J. 505). Nevertheless, the Commission ordered the present temporary reduction at a time when the Company's employees were calling for large wage increases (R. 6109-12) and when the impact of price inflation upon the cost of utility operations was generally recognized as requiring rate increases (Ann. Rep., P. S. C., 1948, p. 7, topic "1. INFLATIONARY TIDE OVERTAKES UTILITY RATES"). Under such circumstances, responsible and equitable regulation should have dictated not only the utmost caution but strict adherence to constitutional safeguards, if any reduction were to be considered.

An analysis of the Commission's action, however, reveals not only an absence of caution but a flagrant denial of the basic rudiments of fair play. For in its haste to claim the largest rate reduction ever ordered in New York, the Commission has perverted "a carefully guarded device" (*Driscoll* v. *Edison Co.*, 307 U. S. 104, at p. 124) into a vehicle for the exercise of unfettered administrative discretion.

As construed by the Commission and the Court of Appeals in the instant case, Section 114 permits the Commission to predicate temporary rates, of indefinite duration, upon a hybrid formula representing neither the net investment in the entire property of the Company used and useful in the public service nor the fair value of the property, and to adopt, as an element of that hybrid formula, accrued depreciation in an amount exceeding by $95,500,000 the amount of accrued depreciation shown by the Company's books of account and duly verified reports to the Commission, without in any way considering or weighing the conflicting evidence presented by the Company's and the Commission's witnesses and without mak-

ing any findings on the evidence before it.* Moreover, the Commission is permitted to adopt automatically the five per cent statutory minimum as the rate of return, without considering and weighing uncontradicted evidence that the Company required a return of 6.24 per cent in order currently to meet the cost of capital and insure the financial integrity of its enterprise, and without making a single finding as to a reasonable rate of return to be provided by temporary rates.

Appellant contends that, as thus construed and applied in this case, Section 114 is invalid and unconstitutional.

Appellant does not ask this Court to analyze or balance the evidence which was before the Commission to determine whether it preponderates one way or another. Since that is not the purpose of the present appeal, the Commission's emphatic citation (Statement Opposing Jurisdiction, p. 10) of the decision in *New York ex. rel. Consolidated Water Co.* v. *Maltbie*, 303 U. S. 158, is wholly irrelevant. The basis of appellant's claim is that the Commission did not analyze or balance the evidence before it, or make findings based upon the evidence, and that its failure to do so violated appellant's rights under the due process clause of the Constitution. That this Court will examine the record to determine whether such rights have

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* Section 114 empowers the Commission, where the duly verified reports of the utility company do not show original cost less accrued depreciation, to "estimate said cost less depreciation." However, an analysis of the Commission's opinion fails to reveal any attempt by the Commission to "estimate" depreciation, as that word was defined in *Consolidated Rock Co.* v. *DuBois*, 312 U. S. 510. In that case the Court, while recognizing that only an "estimate," as distinguished from a mathematical certitude, could be made of earning capacity, stated (at p. 526):

> "* * * But that estimate must be based on an informed judgment which embraces all facts relevant to future earning capacity * * *."

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been violated is well settled (see *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, 348, cited in the *Consolidated Water Co.* case).

The Commission Counsel's answer to the charge of confiscation and the denial of procedural due process is in the nature of a confession and avoidance. Unable to point to a single statement by the Commission that it considered and weighed relevant evidence of the Company's witnesses on the subject of depreciation and fair rate of return, or to a single finding made by the Commission on either of these crucial factors, the Commission's sole defense is predicated upon the alleged panacea of recoupment. Thus, at one point it is argued that (Statement Opposing Jurisdiction, pp. 12-13):

> "• • • the validity and legality of action taken by the Commission cannot properly be tested by reference to constitutional standards of procedural due process applicable to the taking of ultimate administrative action which would finally affect the property rights involved. Under the New York system of rate-making, integrated within the provisions for judicial review, such constitutional standards are applicable only when the final rates are fixed."

In an attempt to bolster its extraordinary argument that recoupment is a justification for whatever is done in the fixing of temporary rates, the Commission claims that (Statement Opposing Jurisdiction, p. 10):

> "• • • Not a single Justice of the Appellate Division, and not a single Judge of the Court of Appeals, has held or even intimated that, under the proper construction of the statute, the Commission has acted unfairly, unreasonably, arbitrarily or in anywise improperly."

However, the fact is that of the twelve appellate judges who reviewed this case, six agreed that Section 114, as construed by the Commission, would amount to "the grant

of an arbitrary power to determine the temporary rate" (275 App. Div. 475, at p. 481; 300 N. Y. 196, at p. 207).*

The plain and unalterable fact is that, in the sixteen years since Section 114 was enacted, no utility company in the State of New York has ever been granted recoupment. This illusory promise of recoupment has been advanced to forestall judicial review of the confiscatory effect of temporary rates, but its actuality and its remedial efficacy have never been demonstrated.

We submit that the promis of recoupment is not an answer to appellant's claim of arbitrary action on the part of the Commission. Nor is the theoretical right to recoup losses suffered from temporary rates a sufficiently adequate and certain protection to the appellant to warrant the imposition, without according to the appellant procedural due process, of confiscatory rates to be charged for an indefinite period of time.

Questions Presented

Appellees' statement opposing jurisdiction of this Court raises the following questions for decision on the motion to dismiss or affirm:

(a) Whether a substantial federal question has been presented;

(b) Whether the order and judgment confirming the temporary rate order are final for the purpose of an appeal to this Court; and

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* In the same vein, Counsel to the Commission urges that the constitutional questions are not substantial because the remittitur of the Court below, which was amended as requested by appellant, does not state that constitutional questions "necessarily" were passed upon (Statement Opposing Jurisdiction, p. 6). That this contention is without merit is clear from this Court's recent decision in *Greyhound Lines* v. *Mealey*, 334 U. S. 653.

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(c) Whether the federal questions sought to be raised herein are *res judicata* and thus do not sustain the jurisdiction of this Court.

ARGUMENT

I. Substantial Federal questions are presented for this Court's determination.

The only case in which the validity of a temporary rate statute containing a provision for recoupment has come before this Court is that of *Driscoll* v. *Edison Co.*, 307 U. S. 104. In the *Driscoll* case, this Court, without deciding the question of the constitutionality of the statute, upheld the temporary rate order expressly in the light of the fact that the Pennsylvania Commission took into account all of the elements of value which the decisions of this Court then held to be requisite to a proper rate determination. However, the Court there stated (307 U. S., at p. 114):

> "• • • A different construction would raise the novel and important question of the constitutionality of a temporary rate, based solely on depreciated original cost, with provision for recoupment of the loss from insufficient temporary rates. • • •"

The substantiality of the Federal questions presented upon this appeal becomes more clearly apparent where, as in this case, the Commission's determination of temporary rates was the result of arbitrary action.

1. The basis upon which the constitutionality of temporary rate legislation in New York was first upheld by the Court of Appeals

As is recognized in the Commission's statement opposing jurisdiction (R. 10-11), the issue before this Court is not the constitutionality of temporary rate procedure as that procedure was first construed and applied by the Commis-

sion and the Court of Appeals in *Matter of Bronx Gas and Electric Co.* v. *Maltbie*, 271 N. Y. 364. However, an analysis of the scheme of temporary rate-making there sanctioned highlights the arbitrary nature of the Commission's present action.

Prior to the enactment of Section 114 in 1934, the Public Service Commission, beginning in 1933, had undertaken to by-pass the then established processes for determining just and reasonable rates. It had sought to enforce what it called "temporary emergency rate reductions," after abbreviated hearings, solely upon the basis of the companies' book entries and verified reports as to capitalization, property, depreciation and operating expenses. The method and formula adopted by the Commission were described by its Chairman, at the outset of hearings in its Case No. 6367, in pertinent part as follows (*Electric Rates, New York City and Suburban Territory*, 1 P. S. C. R. (1933) 391; *Re Rates and Rate Structures*, P. U. R. 1933E, 451, 457):

> "After careful consideration the Commission has determined to establish temporary emergency rates *wherever the facts relating to a company as set forth in the sworn reports to the Commission seem to justify such action.* It is not contemplated in the establishment of such rates that a valuation of the property as required by the courts for a final determination will be made. Such valuations require lengthy procedure, wearisome hearings, and often extended litigation.* * *" (Italics supplied.)

In justifying the fixing of a temporary emergency reduction in the electric rates of the New York Edison Company, a predecessor of the present appellant, the Chairman of the Commission again noted that "the sworn reports to the Commission without the adjustment or elimination of a single item" formed the basis of the Commission's action, and that from the book fixed capital "there were deducted the amounts of the retirement reserves and contributions for extensions made by the public which represent no invest-

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ment upon the part of the companies" (1 P. S. C. R. (1933), at pp. 407, 408; P. U. R. 1933E, at pp. 468, 469).

Faced with Court rulings against its emergency rate reductions (see *Rockland Light and Power Co.* v. *Maltbie*, 241 App. Div. 122; *Queens Borough Gas & Electric Co.* v. *Maltbie*, 245 App. Div. 784), the Commission sought enabling legislation. In its annual report to the Legislature in 1933, the Commission, after noting that the basis of the Court actions was the absence of legal authority in the Commission to establish these rates and that the same rule of law applied to temporary rates that applied to final rates, stated (1 P. S. C. R. (1933), at pp. 13-14):

> "As pointed out in the opinions adopted by the Commission, this doctrine would practically nullify the power of the Commission to fix temporary rates, for if a value must be found before a temporary rate can be fixed, action by the Commission will be delayed until the case is nearly or quite ready for final adjudication.
>
> "Appeal has been taken by the Commission from the decisions staying the temporary rate orders, but final determination will not be reached for some time; and in any event, the law should be clarified so as to remove the opportunity for continued litigation and a minimum should be established below which the Commission may not go in fixing temporary rates. In order that justice may be done, the Commission should also be given authority to consider the effects of the temporary rates in its final determination. The Commission suggests legislation to be enacted to carry out these recommendations."

Following the Commission's request, the Legislature in 1934 enacted Section 114, and the Governor, in approving the bill, stated in part (Pub. Papers of Governor Lehman, 1934, p. 637):

> "Under existing law, the Commission has attempted, upon the basis of sworn reports to the Public Service Commission, to order reductions in certain

> instances for a period of one year. In certain other instances, it has found that no reduction should be made and it has so ruled. But in every New York City case where the Commission has attempted to order reduced rates for only one year, the companies have gone to court and stayed the order of the Commission. Tedious legal proceedings are now under way. There is some question whether the Commission has the legal authority to do what it has attempted to do, and the recommendation of the Governor upon this point is to cure any possible defect in the law and to empower the Commission to make temporary reductions where the facts warrant."

And (*id.*, at p. 637):

> "* * * It may be said, however, that it is quite possible the utilities are blind to their own interests and that if the public does not obtain prompt relief, it will have recourse to other measures where prudent, unimpaired investment is not given the protection provided for in the proposed measure."

It would seem apparent from all that preceded the enactment of Section 114 that the sponsors of the temporary rate scheme sought to have adopted for temporary rates the net or prudent investment base (but applied only to physical property), as had been forcefully urged in the dissenting opinion in *State ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission*, 262 U. S. 276, 289-310, in lieu of the fair value base established in *Smyth* v. *Ames*, 169 U. S. 466 (1898). In the *Southwestern Bell Telephone Co.* case, the dissenting Justices had urged (at p. 292):

> "* * * To give to capital embarked in public utilities the protection guaranteed by the Constitution, and to secure for the public reasonable rates, it is essential that the rate base be definite, stable, and readily ascertainable; and that the percentage to be earned on the rate base be measured by the cost, or charge, of the capital employed in the enterprise. * * *"

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In support of the thesis for a "definite, stable and readily ascertainable" rate base, they recounted the experience with the application of the formula laid down by the Courts for determining fair value. They pointed out that "The rule of *Smyth* v. *Ames* sets the laborious and baffling task of finding the present value of the utility," by estimates of reproduction or replacement costs (p. 292), "And finally, it is estimated how much less than the new each part, or the whole, is worth. That is, the depreciation is estimated" (pp. 293-294). They noted that "Several different methods are used for measuring depreciation: (1) The replacement method; (2) the straight-line method; (3) the compound interest method; (4) the sinking-fund method; (5) the unit cost method. It is largely a matter of judgment whether, and to what extent, any one of these several methods of measuring depreciation should be applied. They may give widely different results" (f. n. p. 294).

They continued (p. 294):

> "• • • Obviously each step in the process of estimating the cost of reproduction, or replacement, involves forming an opinion, or exercising judgment, as distinguished from merely ascertaining facts. And this is true, also, of each step in the process of estimating how much less the existing plant is worth, than if it were new. • • •"

The Justices urged, therefore, that (p. 306):

> "The adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return would give definiteness to these two factors involved in rate controversies which are now shifting and treacherous, and which render the proceedings peculiarly burdensome and largely futile. • • •"

When the Commission undertook to fix temporary rates in the *Bronx Gas and Electric Co.* case, *ante*, it adhered basically to the pattern prescribed by the Legislature and predicated those rates upon a prudent investment basis. In

that case the Commission, acting before the record was closed and without the introduction of opinion testimony on depreciation, fixed temporary rates designed to provide a return of 6 per cent upon the company's book figures as shown in its reports to the Commission, that is, the original cost of the property, including construction work in progress, less the company's book figures as to the balance in its reserve for retirements (1 P. S. C. R. 1934, pp. 624, 625).*

In sustaining the constitutionality of the course pursued by the Commission in the *Bronx* case, against the claim that temporary rates could not be fixed in advance of receiving evidence of "present value", the Court of Appeals stated (271 N. Y. 364, 372-373):

> "We note at once that the temporary rate shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation of the physical property of the utility company used and useful in the public service. At least there is some accuracy in these figures; they can be fixed with some certainty and are not dependent altogether upon speculative expert opinion. (*Clark's Ferry Bridge Co.* v. *Public Service Com.*, 291 U. S. 227.)"

And further (*id.*, at p. 374):

> "The Commission fixes a temporary rate pending the hearing. It is based upon the elements stated, which are not all of those required to fix a permanent rate. As before stated, this would be impossible, if we must consider in fixing a temporary rate all the elements required for the final rate: no temporary

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* In the case of the *Yonkers Electric Light and Power Company*, 271 N. Y. 364, decided together with the *Bronx Gas and Electric Co.* case, the Commission fixed temporary rates designed to provide a return "of slightly more than 6 per cent" upon the company's book figures, that is, the original cost of the property, including construction work in progress, less the reserve for retirements, as shown on that company's books and verified reports (1 P. S. C. R. 1934, 644, 667).

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rate could ever be fixed. This also is self evident. *Therefore, to meet these conditions the temporary rate is fixed, within reasonable limits, upon figures which can be with some exactness obtained from the books of the company, showing original cost or investment* • • •." (Italics supplied.)

The rationale of the temporary rate scheme as set forth by the Court of Appeals in the *Bronx* case was both clear-cut and simple. Under that scheme, temporary rates were to be established, pending long drawn-out hearings, "within reasonable limits, upon figures which can be with some exactness obtained from the books of the company, showing original cost or investment." The temporary rates were to be fixed at the outset of the hearings, upon a net or prudent investment basis, which obviated the need for "speculative expert opinion", and were to provide a return "within reasonable limits" of the return necessary under just and reasonable permanent rates. Finally, it was considered that if, even with these primary and essential safeguards, the temporary rates proved not to be fully compensatory, the deficiency should be made up in the fixing of permanent rates.

Referred to in the concurring opinion in the *Driscoll* case (307 U. S., at p. 124) as "a carefully guarded device", the scheme of temporary rate-making sanctioned in the *Bronx* case is a far cry from that which the Court of Appeals has accepted as constitutional in the present case. Under the present construction of Section 114, the temporary rate scheme is not a means of avoiding long drawn-out hearings but is a device by which the Commission may avoid its duty to fix permanent rates; the safeguard of a net investment basis, showing the actual dollars invested less those returned by the consumers, no longer exists; speculative opinion of a single Commission witness, without any regard for controverting evidence of other witnesses, forms the basis for action; and the temporary rates no longer provide a return "within reasonable limits" of that anticipated as necessary under permanent rates.

And, we submit, where as in the present case the Commission closes its eyes to evidence before it, makes arbitrary adjustments in book values to support a drastic temporary cut in rates which otherwise would be impossible and delays beyond any reasonable period a promulgation of its findings as to final rates, recoupment is not a safeguard of appellant's constitutional rights.

2. The rate base adopted by the Commission in this case for temporary rates under Section 114

The rate base upon which the Commission predicated the ordered electric rate reduction is tabulated in the Commission's opinion (R. 71-72), and in condensed form is as follows:

Original Cost of Plant in Service as of September 30, 1948		$784,170,696
Depreciation Reserve Per Books	$160,558,055	
Additional Amount Deducted by Commission as "Accrued Depreciation"	95,500,000	
Total Amount Deducted by Commission as "Accrued Depreciation"		256,058,055
		$528,112,641
Less Contributions in Aid of Construction		61,115
		$528,051,526
Materials and Supplies per Books		29,772,023
		$557,823,549
(Rounded Amount)		$558,000,000
Construction Work in Process (Rounded Amount)		38,000,000
Temporary Rate Base		$596,000,000

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(a) The Original Cost of Plant in Service.

The Plant In Service figure is set forth in the Commission's opinion as the "reported book cost of property" (R. 64, 65), and was used by the Commission in arriving at its temporary rate base (R. 211). It represents "original cost" as defined in the Uniform System of Accounts prescribed by the Commission (R. 298), and is the balance remaining after writing off all electric "acquisition adjustments," amounting to $80,000,000. Thus, the current balance of original cost represents a bare minimum of the amounts originally invested in the properties.

The amount of approximately $30,000,000 for materials and supplies was included in the temporary rate base by the Commission as physical property (R. 71, 72). However, no allowance was made by the Commission for other working capital actually employed, principally working cash on hand and funds for expenses advanced by the Company prior to collection of bills from customers, which the Commission recognized would amount to an additional $20,000,000 (R. 65, 67).

Also included in the Commission's calculation of the rate base was the amount of $38,000,000 for Construction Work in Progress. Since practically all of the unfinished construction work representing the expenditure of $38,000,000 at September 30, 1948, was actually completed and placed in service by December 30, 1948, when the Commission made its temporary rate order, and since it was plain from the evidence before the Commission that the balance of this amount—and more besides—would be placed in service during the period for which the temporary rates would be effective, the sum of $38,000,000 reflected only a minimum of that classification of property.

(b) The Amount Deducted as "Accrued Depreciation".

The figure of $160,558,055 is shown in the Commission's opinion as the "book depreciation reserve."* This reserve has been accrued in compliance with accounting regulations of the Public Service Commission, in effect since January 1, 1909 (Exs. 115, 334; R. 1414-19, 5141-42). At no point in the proceeding has there been any challenge of the fact that the Company's reserve for depreciation correctly shows the reserves accumulated to provide for the retirement or replacement of physical property.

Although the Company's verified reports showed that its depreciation reserve, accumulated strictly in accordance with the Commission's general accounting orders and directives, amounted to $160,558,055, as of September 30, 1948, the Commission deducted a total of $256,058,055 (R. 72) or $95,500,000 more than was shown by the Company's reports, from the original cost of physical property, in computing the temporary rate base. According to the Commission, this was done on the ground that (R. 67) "Engineers of the Commission testified that the book depreciation reserve is deficient to the extent of about $96,500,000." Along these same lines, the Commission's statement opposing jurisdiction (R. 6) makes the claim that the testimony of the Company's witnesses showed that the book reserve for depreciation did not show the accrued depreciation of the property.

An examination of the depreciation testimony submitted by the Commission's witness, Mr. Goldthwaite, and

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* This depreciation reserve is equal to 20.5 per cent of Electric Utility Plant in Service, as compared with an average of 23.2 per cent for all privately-owned electric utilities in New York State outside of New York City at December 31, 1947 (Ann. Rep. P. S. C., 1948, p. 185).

that of the Company's witnesses,* reveals at once the misleading nature of the Commission's claim that any witness had testified to a deficiency in the book reserve. The record shows that the testimony of Mr. Goldthwaite and that of the Company's witnesses was related not to the Company's *accounting* but to a *valuation* question. Thus, Mr. Goldthwaite did not testify at any point that his opinion as to the "depreciation" in the property should supplant the balance in the depreciation account, or that the Company's depreciation is incorrect from the accounting standpoint. He testified (R. 549):

> "Q. How do you define depreciation?
>
> "A. Depreciation is a loss of value."

He explained that "* * * in my estimates I have proceeded as if there were no change in price level. I have not taken into account the increased cost of new equipment which, if allowed, would give an element of appreciation that might offset part of the depreciation" (R. 575).

The Company's valuation witnesses made it clear that their estimates of accrued depreciation dealt with "loss in value" in the economic sense and not with amortization of original cost in the accounting sense. Although related to original cost, the testimony shows that the estimates presented by each witness purported to represent loss in value and that no witness undertook to estimate a deficiency in the book reserve from the accounting standpoint. Thus Mr. Franklin testified (R. 1372):

> "Depreciation is loss in value of property from all causes,"

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* Theodore E. Seelye, Vice-President of the engineering firm of Day & Zimmermann, Dean A. A. Potter of the Engineering School of Purdue University, Harland C. Forbes, Executive Vice-President of the Company, and Charles W. Franklin, Electrical Engineer of the Company.

and (R. 1373):

> "Q. Why did you apply the [depreciation] percentage figures to original cost?
>
> "A. Because I did not have time to make an adequate investigation as to the extent to which loss in value resulting from expiration of service life has been offset by increased construction costs. Consequently I have been obliged to relate my estimates solely to original cost, *notwithstanding my belief that the resulting dollar estimates on that basis overstate the actual loss in value of the property.*" (Italics supplied.)

Mr. Seelye similarly defined depreciation as (R. 1500) "the loss in value of property from all causes." Under cross-examination by Chairman Maltbie, Mr. Seelye also made it clear that he was not dealing with depreciation from the accounting standpoint (R. 1856-57):

> "Q. Now, is that the amount that the company should have in depreciation reserve as of the end of 1945 for account 311?
>
> "A. *That is not intended to represent the amount required to amortize the investment.*
>
> * * * * * *
>
> "Q. * * * I asked you whether the amount in depreciation reserve for account 311 should be more or less than $9,750,000 as of December 31, 1945.
>
> "A. I have made no estimate of that, sir.
>
> "Q. And you were not asked to express an opinion?
>
> "A. No, sir." (Italics supplied.)

No witness in the proceeding before the Commission testified to a reserve deficiency in any amount. The Commission's statement to that effect is not supported by the record; it is occasioned by a confusion of "loss in value" estimates with "depreciation reserve" figures.

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The distinction between the accounting and valuation terminology on questions relating to depreciation is forcefully made in Bonbright, "The Valuation of Property," Vol. II, p. 1140 (1937):

> "We conclude, then, that when a company has already built up a depreciation reserve, the amount of this reserve should be deducted from the cost of its assets in the determination of a rate base under the 'original cost' principle—not because the reserve measures 'actual depreciation' in an appraisal sense, but rather because it measures amortized capital investment in the accounting sense."

The net result of the Commission's course of action is that it adopted a hybrid rate base, which represents neither the net investment nor the present value of the physical property, and which denies to the Company a return under temporary rates on $95,500,000 of actual investment in property.

3. The Commission's admitted failure to consider and weigh relevant evidence on the question of depreciation constitutes a denial of procedural due process

Having construed the words "accrued depreciation" in Section 114 to relate to the controversial question of "loss in value", then surely procedural due process required that the Commission weigh and consider the conflicting evidence, covering a large part of the record before it,* upon this

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* Goldthwaite's testimony on depreciation, given on eight separate hearing days, fills 233 pages of the record; Seelye's, given on seven separate hearing days, fills 197 pages; Forbes', given on four separate hearing days, fills 129 pages; Potter's, given on two separate hearing days, fills 83 pages; Franklin's, given on two separate hearing days, fills 53 pages—a total of 695 pages for these witnesses.

question and advance the reasons and factual grounds of its determination. The Commission, however, did not proceed in this manner, but exercised instead an unfettered choice.

From the mass of controversial evidence on depreciation, the Commission plucked the testimony of the single Commission witness, Goldthwaite. Without making findings upon the evidence before it, without considering opposing evidence, without analyzing the "loss in value" existing in the Company's property, without setting forth the reasons and factual grounds of its choice, the Commission *adopted,* as if on faith, the testimony of this favored witness. That the Commission in no way attempted to resolve the depreciation issues in the light of all the relevant evidence is shown by its own unequivocal admission that (R. 66):

> "In addition, the Commission staff claimed a very large deficiency in the book depreciation reserve relating to the electric property. While all of these and many other claims must be disposed of in fixing final rates, no adjustment has been reflected in Table 2 [showing the actual book figures] for any of these items."

According to its opinion, the Commission made no pretension of even reviewing the evidence in the record, for (R. 56):

> "* * * Merely to digest the voluminous record and present the numerous questions to be decided before a whole rate schedule can be framed will take many weeks and probably several months."

Likewise the Commission did not take time to consider these controversial issues of fact, for, as it stated (R. 59):

> "To settle all of these questions will, as already stated, require several months as it is incumbent upon the Commission to make a careful analysis of the facts * * *."

In the light of these clear admissions that the Commission's procedure did not include a consideration of the Company's evidence, and in the absence of a single reference to that evidence in the Commission's opinion, we can only assume that the Court of Appeals misapprehended the nature of appellant's contention, when it stated (300 N. Y. at p. 207):

> "• • • While other and variant figures were in the record, the courts will not and cannot assume that the Commission failed to consider them in reaching its estimate, which concededly was not a final determination."

Under the ruling of the Court of Appeals, a regulatory agency is free to disregard relevant evidence in the performance of its quasi-judicial functions. We submit that the rule thus established is in conflict with the decisions of this Court which define the requirements of procedural due process.

In the *Chicago Junction Case*, 264 U. S. 258, this Court, in striking down an order of the Interstate Commerce Commission, held (at p. 265):

> "• • • The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. • • •"

In *Railroad Commission* v. *Pacific Gas Company*, 302 U. S. 388, this Court, in rejecting a contention that the Commission's action in fixing gas rates constituted a denial of procedural due process, thus stated the essential requirements of that process (at pp. 393-394, 397):

> "• • • When the rate-making agency of the State gives a fair hearing, receives and considers the competent evidence that is offered, • • • the requirements of procedural due process are met • • •."

> "The Commission was entitled to weigh the evidence introduced * * *. The Commission was entitled to determine the probative force of the respondent's estimates. That the Commission did so is apparent from both its statement to that effect and the reasons it gives for considering these estimates to be without positive value. * * *"

In *Wichita R. R.* v. *Pub. Util. Comm.*, 260 U. S. 48, this Court, in striking down a rate order of a state regulatory agency, stated (at p. 59):

> "* * * In creating such an administrative agency the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined *and show a substantial compliance therewith* to give validity to its action." (Italics supplied.)

See, also:

> *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, 198;
> *Morgan* v. *United States*, 298 U. S. 468, 480;
> *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 583-584.

In an attempt to extenuate the arbitrary nature of the Commission's action, its Counsel argues (Statement Opposing Jurisdiction, pp. 7, 12-13): (1) that "A complete analysis of the extensive testimony and exhibits relating to depreciation, and the making of a final and conclusive determination of the accrued depreciation of the properties would have consumed a prohibitive period of time",*

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* The testimony on accrued depreciation was virtually completed at the hearing of January 6, 1948 (R. 4213), almost a full year before the making of the temporary rate order. The accrued depreciation testimony after that date related to arithmetical extensions of the exhibits to a later date, and fills less than 30 pages of the record (R. 4532-42, 4679-85, 4759-65, 5275-79).

and (2) that "the validity and legality of action taken by the Commission cannot properly be tested by reference to constitutional standards of procedural due process applicable to the taking of ultimate administrative action which would finally affect the property rights involved."

The answers to such arguments are readily made.

First. In the Court below, one of the appellant's arguments was that an interpretation by the Commission of "accrued depreciation" as "loss in value" would necessarily resurrect the very vagaries and uncertainties of resort to controversial opinion testimony which the net investment theory of Section 114 was designed to avoid. That the statutory objectives of expedition and promptness could have been satisfied, and the present constitutional issue avoided, by adhering to the scheme of Section 114 as interpreted and applied in the *Bronx Gas and Electric Company* case, *ante,* is clear. But the fact that the Court below did not thus preserve the statutory objectives is not a valid reason to seek before this Court the same result at the expense of established principles of procedural due process.

This Court has held that a denial of the minimal requirements of due process cannot be rationalized on the ground that the Commission did not have time to weigh all the evidence. As stated by Mr. Justice Cardozo (*Ohio Bell Telephone Co.* v. *Commission,* 301 U. S. 292, 305):

> "* * * There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

Second. Although the Commission concedes at one point (Statement Opposing Jurisdiction, p. 12) that the recoupment provision cannot authorize arbitrary action in the fixation of temporary rates, in the next sentence (*id.,* at pp. 12-13) it argues that the very constitutional standards

which protect the appellant against such action are inapplicable in this case. If the Commission is not required to consider and weigh evidence and to make findings thereon, the protection afforded by a hearing is meaningless.

In his dissenting opinion in the *Southwestern Bell Telephone Co.* case, cited *ante* at p. 12, Mr. Justice Brandeis noted that there were several different methods for measuring depreciation, some of which "give widely different results." The Appellate Division also noted in its opinion in this case (275 App. Div. 475, at p. 481) that "More than a half dozen recognized methods of computing depreciation are in use by accountants", and that "If all of these methods were applied to the same problem as many different results would be produced as there were methods employed."

If the Commission has the power to choose from any of these methods to obtain the particular result desired, if it is unhampered by the need to consider and weigh conflicting evidence or the need to advance the reasons for its choice, then the Commission possesses and has exercised the very arbitrary power which it concedes recoupment does not authorize. As the Appellate Division stated (275 App. Div. 475, at p. 481):

> "* * * If the contention of the respondents were sustained the Commission could always resort to an estimate by the simple expedient of adopting a method of computing depreciation which would produce an amount in excess of that produced by the method used by the utility. *In result this would be the grant of an arbitrary power to determine the temporary rate.* * * *" (Italics supplied.)

Indeed, the Court below, at an earlier date, recognized that the action of the Commission in prescribing certain accounting requirements for public service corporations was a "judicial act" which required the protection of a fair hearing. Thus, in *Matter of New York Edison Co.* v.

Maltbie, 271 N. Y. 103, the Court below held invalid, under the Federal Constitution, the Commission's attempt to impose upon utility corporations the straight-line method of accounting for depreciation, without receiving and considering sworn testimony and making "findings" based thereon (*id.*, at p. 104).

At a later point (see pp. 35-42, *post*), we discuss the inadequacy and illusory nature of recoupment as a remedy for confiscatory rates. But even if it is assumed, *arguendo*, that recoupment does operate to prevent loss, the Commission's argument fails to recognize the essential point that procedural due process under the Constitution is not satisfied by merely avoiding confiscation. The distinction between these claims was pointed out by this Court in *Railroad Comm'n* v. *Pacific Gas Co.*, 302 U. S. 388, 392-393, as follows:

> "As the District Court did not deal with the issue of confiscation and the evidence is not before us, we are concerned only with the question of procedural due process, that is, whether the Commission, in its procedure, as distinguished from the effect of its order upon respondent's property rights, failed to satisfy the requirements of the Federal Constitution. We examine this question in the light of well settled principles governing the proceedings of rate-making commissions."

The sole authority which the Commission claims for its extraordinary contention that constitutional standards are inapplicable to the present situation is the case of *Beaver Valley Water Co.* v. *Driscoll*, 28 F. Supp. 722. In that case, the Commission fixed temporary rates, at the outset of the hearings, upon depreciated original cost plus working capital and materials and supplies. The rates were designed to provide a return of 6 per cent upon this rate base.

No claim was made by the Water Company that the Pennsylvania Commission had failed to consider evidence on the limited factors established as the basis for fixing

temporary rates. The company's claim was that procedural due process had been denied because it had not been permitted to introduce evidence on fair value factors not enumerated in the statute. In the present case, however, appellant's claim is related not to the limited nature of the factors to be considered in fixing temporary rates but to the denial of the Company's right to have its evidence upon those limited factors considered and weighed by the Commission and findings made thereon.

We respectfully submit that the procedure pursued by the Commission denied to the Company the basic rudiments of fair play and that this arbitrary denial is in no way justified by the alleged temporary nature of the rates in question. As one commentator has stated (Note, 46 Yale L. J. 505, 509), due process of law must be accorded to a utility, "even if the new rates are provisional and temporary" and a final rate "is to correct whatever deficiencies are discovered in the temporary schedule."

4. The effect of the temporary rate order upon the Company's rate of return

The effect of the temporary rate reduction upon the Company's income from electric operations may be *initially* demonstrated by an analysis of the relation of that reduction to the twelve months' period ended September 30, 1948, which period was adopted as the "base year" in the Commission's opinion. As indicated in the Statement Opposing Jurisdiction (p. 8), the analysis shows that the Company's operating income for the twelve months' period ending September 30, 1948, would have been reduced to *$30,261,410*.

As we have shown (p. 16, *ante*), the rate base of $596,000,000, upon which the Commission predicated the ordered rate reduction, understates the Company's net investment in physical property by $95,500,000. Since a net investment base of original cost less reserves per books—the actual dollars invested by the stockholders less those

returned by the consumers—amounts to $691,500,000, the operating income would represent a return of only *4.38 per cent*. Moreover, the $691,500,000 upon which the 4.38 per cent is calculated represents only the Company's actual investment in *physical* property and does not include $20,000,000 of other elements of working capital which the Company necessarily provided in order to render service to the public (see p. 17, *ante*).

Upon the Commission's rate base of $596,000,000, the operating income represents a return of *5.07 per cent* (see Statement Opposing Jurisdiction, p. 9). In addition to the exclusion of $20,000,000 in working capital, the Commission's adoption of this rate base denied a return on $95,500,000 of actual investment by the Company's stockholders.

Important to note is that the above rate of return computations afford only an *initial* demonstration of the effect of the temporary rate reduction upon the Company's income, because the operating income figure of $30,261,410 is related to a "base year" which began some 15 months and ended some 3 months before the temporary rates were to become effective.

In particular, the income figures for the "base year" ended September 30, 1948, upon which the Commission based its order, reflect only 9 months of the 1948 wage increases, estimated to approximate $4,227,000 on an annual basis for electric operations (Ex. 310; R. 4742-47). Moreover, at the last hearing before the Commission, counsel for the Utility Workers Union of America, C. I. O. (the certified bargaining agent of all eligible employees of the Company) pointed out that substantial wage increases of "15 cents across the board" were being sought (R. 6110), a matter in which each of the Company's 26,000 employees had a vital interest (R. 6111). However, the labor union counsel's request for consideration was given short shrift by the Chairman of the Commission (R.

6111-12). No consideration was given in the Commission's opinion to these inescapable increases in labor costs.

The Commission's failure to make "an honest and intelligent forecast as to probable price and wage levels during a reasonable period in the immediate future" (*McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 408) is made abundantly clear by the following admission which appears in the Statement Opposing Jurisdiction (p. 8):

> "* * * In projecting the prospective annual revenues and expenses for the temporary rate period, the Commission adopted appellant's own book figures for the base year ended September 30, 1948, *adjusted only for estimated taxes* * * *." (Italics supplied.)

It is significant also that while ignoring evidence of rising costs in the present case, the Commission itself was already on record that the impact of price inflation upon the cost of utility operations was generally requiring rate increases. (Ann. Rep. N. Y. P. S. C., 1948, p. 7, topic 1. "INFLATIONARY TIDE OVERTAKES UTILITY RATES").

5. The Commission's resort to the statutory 5 per cent minimum rate of return as an automatic device for fixing temporary rates, without considering and weighing relevant evidence, constitutes a denial of appellant's constitutional rights

When Section 114 was enacted by the Legislature and approved by the Governor, it was anticipated that the Commission would fix temporary rates to provide the minimal 5 per cent only during periods of stringent depression, and certainly not under the inflationary conditions which prevailed when the Commission's present action was taken. Upon this point Governor Lehman said in 1934, when he approved the Section 114 bill (Pub. Papers of Governor Lehman, 1934, p. 637):

> "The bill also fixes a *minimum* [italics in original] amount below which the Commission may not go in fixing temporary rates. It does not prescribe a maximum but leaves the Commission to determine

the exact rate under the conditions that obtain. The minimum rate of return fixed in the bill is 5 per cent and the question naturally arises why should it be 5 per cent.

"In the first place, any minimum that is fair must be adapted to the most unfavorable conditions. If there were no depression, it would undoubtedly be true that a 5 per cent return would not be a reasonable rate, because it would not be a return that is actually being earned by private companies in competitive business operating under similar risks and similar conditions. But at present and for over three years, private companies have not earned 5 per cent. Many of them have not even paid operating expenses."

However, under the Commission's construction of Section 114, sanctioned by the Court below, the statutory 5 per cent minimum assumes a vastly different function. Rather than a minimum to be invoked only under the "most unfavorable conditions", the 5 per cent rate of return is now available to the Commission as an automatic device for fixing temporary rates. According to the Commission (Statement Opposing Jurisdiction, p. 9), "The statute provides only that the return must not be less than 5 per cent." In other words, the requirement that temporary rates "shall be sufficient to provide a return of not less than five per centum" is now construed to authorize the fixing of temporary rates "sufficient to provide a return *of only* five per centum."

By this perversion of the meaning of the minimal requirement, the Commission was enabled to fix temporary rates in the present case solely with reference to a 5 per cent rate of return, without considering and weighing uncontradicted evidence in the completed record that such rate of return was insufficient to assure confidence in the financial integrity of appellant's enterprise so as to maintain its credit and to attract necessary capital (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591). To

hold that the Commission need only make a mathematical calculation of a 5 per cent return is to deny to appellant the protection of procedural due process and to confiscate its property without due process of law.

The uncontradicted evidence in the record before the Commission showed that on the basis of the Company's capital structure and the experienced cost to it of raising its outstanding capital, the required rate of return was not less than 6.24 per cent. Evidence based on the cost-of-capital method was presented for the Company by two witnesses having extended experience in financing, accounting, rate of return and other regulatory matters.

Charles Nodder, Assistant Secretary of the Company, testified regarding the cost to the Company of its debt and preferred stock capital as of December 31, 1946 (R. 1554-93), and later brought his data forward to June 30, 1948 (R. 5886-5905). In order to show the rate of return to which the Company is entitled for its common stock, testimony was presented by J. Rhoads Foster, utilities consultant and lecturer on public utilities regulation at New York University (R. 1595-1601).

Having found the cost of capital for the individual classes of securities composing the Company's capital structure, a determination was made of the total overall cost of capital to be used in establishing a fair rate of return for the Company's electric business. This determination was first made by Mr. Foster (Ex. 127) in January 1947, and later brought up to June 30, 1948, by Mr. Nodder (Ex. 370) to reflect the changes which had occurred in the Company's capital structure.

As of June 30, 1948 and on the basis of the Company's capitalization ratios, the following composite cost of the total capital was derived (Ex. 370):

	% of Total Capital	*Average Cost per Dollar*	*Components of Cost of Total Capital*
Bonds and Debentures	33.9	2.95%	1.00
Preferred Stock	17.3	5.52%	.95
Equity Capital	48.8	8.8 %	4.29
Total	100.0%		
		Average cost per dollar of Total Capital	6.24%

This cost-of-capital evidence was buttressed by the testimony of a third witness for the Company, Adrian H. Massie, banker and Vice President of the New York Trust Company, who expressed the opinion that the Company required an overall return of 6.5 per cent from its electric business in order to maintain and support its credit and raise money necessary for the proper discharge of its functions (R. 1737).

The testimony of the three Company witnesses was not opposed by counter-evidence.

Evidence was also introduced which showed that, for the ensuing several years, the Company was faced with a construction budget of unprecedented proportions in order to render the "safe and adequate" service required by law. To a large extent the construction program is required to restore operating reserves which had almost disappeared because of war-time restrictions on the availability of materials and labor (R. 1712-21; Ex. 146, Forbes).

Obviously, the Company will need to resort to extensive financing, if it is to meet its obligations. And if this financing is to be done without distorting the Company's capital structure and making it top-heavy with debt, the Company will have to resort to equity financing. To make

this possible, it is essential that the Company's rates provide a return at least equal to its experienced cost of capital.

In the face of this uncontradicted evidence as to the experienced cost of capital to the Company, the Commission fixed temporary rates designed solely to satisfy the statutory minimum of 5 per cent. Not a single reference to the Company's evidence, either denying or affirming its probative force, not a single finding as to a reasonable rate of return, and not a single indication that the Commission so much as glanced at this testimony, appears in the Commission's opinion. We submit that this arbitrary course of procedure constitutes a denial to the appellant of procedural due process of law.

The Chicago Junction Case, 264 U. S. 258, 265;
Southern Ry. Co. v. *Virginia*, 290 U. S. 190, 198;
Morgan v. *United States*, 298 U. S. 468, 480;
Ohio Bell Telephone Co. v. *Commission*, 301 U. S. 292, 305;
Railroad Commission v. *Pacific Gas Company*, 302 U. S. 388, 392-394;
Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 583-584.

Moreover, the Commission's order which was designed to yield a return of no more than 5.07 per cent upon a hybrid rate base which understated the Company's actual net investment by $95,500,000, and upon the basis of operating expenses which failed to give full effect to wage increases already made by appellant for the calendar year 1948 or any effect to imminent wage increases for 1949 (and which, as has been shown, would produce a return of only 4.38 per cent upon a true net investment base of original cost less depreciation per books of account), in the face of uncontradicted evidence showing that appellant required a return of 6.24 per cent to attract necessary capital, results in the confiscation of appellant's property without due

process of law and in the denial to it of the equal protection of the laws.

Bluefield Water Works Co. v. *Public Service Commission*, 262 U. S. 679;
Federal Power Commission v. *Hope Natural Gas Company*, 320 U. S. 591.

6. As presently construed, the provision for recoupment is a completely inadequate and uncertain safeguard against irreparable loss, inflicted upon the Company under the guise of temporary rates

It is clear that in opposing jurisdiction in this appeal, the Commission relies primarily upon the "recoupment provision" of Section 114* as the validating ingredient of what otherwise would concededly be an unconstitutional process of rate-making (*Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43). It is claimed not only that the recoupment provision renders inapplicable in this case long-established constitutional standards of procedural due process, and thus justifies the most arbitrary sort of procedure in the determination of temporary rates, but also that the promise of recoupment obviates the confiscatory effect of temporary rates, regardless of the duration and amount of the losses suffered by the utility under those rates.

The first answer to these claims is that procedural due process is not satisfied solely because the question of confiscation is not present (*Railroad Comm'n* v. *Pacific Gas*

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*The concluding paragraph of that Section provides that:

"* * * The commission is hereby authorized in any proceeding in which temporary rates are fixed, determined and prescribed under this section, to consider the effect of such rates in fixing, determining and prescribing rates to be thereafter charged and collected by said public utility company on final determination of the rate proceeding."

Co., 302 U. S. 388, 392-393; see pp. 23-24, 27, 34, *ante*). The second answer is that, unless the realities of the situation are to be ignored, the practical construction given by the Commission itself in this case, as well as in others, to the obligation to provide recoupment, destroys the efficacy of the statute as a safeguard.

At the outset, we note that in the more than sixteen years in which Section 114 has been in existence, no single utility has ever been granted recoupment. Although the Court of Appeals has stated that recoupment operates to prevent any loss, the reference has always been to prospects for the future and never to an actuality of the past. A rational evaluation of the adequacy of recoupment can only be made in the light of that fact.

As the Legislature undoubtedly contemplated in Section 114, the recoupment provision was but one element of an integrated scheme for fixing temporary rates. In recognition of the fact that the efficacy of recoupment would depend in large part upon the amount to be recouped, the Legislature sought to insure that the temporary rates would approximate, as nearly as was consistent with the statutory objective to facilitate prompt action, the permanent rates ultimately to be established. In an earlier case, the Commission had stated this general objective of a temporary rate order, as follows (*Re Syracuse Transit Corporation*, P. S. C. Case No. 11623, 59 P. U. R. (N. S.) 170, at p. 185):

> "In establishing temporary rates, the fares to be established under the statute should approximate rates which can be reasonably expected to be sustained after completion of the hearings and the fixing of final rates."

To insure this approximation of temporary and permanent rates, the Legislature established certain safeguards. First, it provided for a net investment rate base derived from the books of the utility company. Obviously, a

utility was in no position to impeach its own books.* Next, a minimum was established below which the Commission could not go in the fixing of temporary rates. As Governor Lehman noted in approving Section 114, this minimum was adapted to "the most unfavorable conditions", since if depression conditions did not prevail "it would undoubtedly be true that a 5 per cent return would not be a reasonable rate" (see p. 31, *ante*). Moreover, as the Governor stated, the statute did not prescribe a maximum, but left it to the Commission "to determine the exact rate under the conditions that obtain."

Under Section 114, as that section was first construed by the Court of Appeals in the *Bronx Gas & Electric Co.* case, cited *ante,* recoupment was deemed an adequate safeguard against confiscation where the temporary rates were designed to provide a return "within reasonable limits" of the return expected under permanent rates, upon a net investment base derived from the Company's books. The conclusion there reached finds support in the fact that the amount to be recouped could hardly be significant in view of the manner in which the temporary rates were determined. In such a situation, recoupment might justify a short-cut temporary rate because, upon a balancing of interests, the benefit to customers in an immediate reduction outweighs the possibility that, although not so intended, the rate might later prove to have fallen short of adequacy.

To recognize the reasonableness of the conclusion reached by the Court in the *Bronx Gas & Electric Co.* case

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* In *Wisconsin Telephone Company* v. *Public Service Commission,* 232 Wis. 274, at p. 305, 287 N. W. 122, at p. 138, the Wisconsin Supreme Court stated, with reference to the New York statute:

> "* * * When a rate base is derived from the books and provision is made for amortization of losses if application of the rates produce a loss, the company is fully protected and may not complain."

is not, however, to hold that recoupment justifies the arbitrary imposition upon a utility company of rates shown in advance to be confiscatory. It is one thing to say that, consistently with constitutional requirements, the Commission may fix a rate for a temporary period which will approximate, as nearly as a fair consideration of existing evidence will afford, a reasonable return to the Company. It is an altogether different thing to assert, as the Commission does in the present case, that it need not try, upon the basis of the evidence before it, to fix rates that will be adequate and reasonable, but, on the contrary, may fix rates which even a cursory examination of the evidence discloses must, perforce, be insufficient under constitutional standards.

Under the scheme of temporary rate-making devised by the Legislature, and first construed in the *Bronx Gas & Electric Co.* case, the emphasis was placed upon the manner in which temporary rates were to be determined. Recoupment was regarded as but one of several component safeguards in a carefully integrated scheme.

However, under the present construction of Section 114, the emphasis has shifted to the point where recoupment standing alone is regarded as the Company's protection against confiscation. Thus construed, the entire pattern of temporary rate-making is destroyed, the temporary rates are no longer intended to approximate the permanent rates and recoupment is no longer an adequate safeguard against confiscation.

Also of prime importance in a determination of the efficacy of recoupment, is the duration of temporary rates. For it must be conceded that the longer inadequate temporary rates are continued in effect, the more illusory the promise of recoupment becomes. In recognition of this fact, at least two states have sought to limit the amount to

be recouped by specifically defining the maximum duration of temporary rates.*

Section 114 provides no such protection against the indefinite continuation of temporary rates, and the Court of Appeals has refused to imply any such limitation upon the Commission's power to continue these rates in effect.** According to the Court below (300 N. Y. at p. 203):

> "* * * considerable time, even after the hearings are closed and the record made, may frequently be required for ultimate determination of the very complicated rate problem presented."

In the present case, the Commission has had before it for *more than sixteen months* a record on permanent rates which was closed on December 2, 1948, but it has yet to fix permanent rates. Meanwhile the inadequate temporary rates are continued in effect, the Company's losses mount each day and the prospect of recoupment becomes increasingly illusory.

Illustrative of the wholly theoretical effect of the recoupment provision and the destructive consequence of its nebulous availability is the recorded experience of the Staten Island Edison Corporation. In the case of that company, the Commission issued an order in May, 1943, directing a "temporary" 8 per cent reduction in electric rates. The company's attempt to enjoin the rates in an equity action was unsuccessful because of the promise of recoupment

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* Both Illinois and Virginia provide that temporary rates may not be set for a period of more than 9 months or a further period of 3 months. See Ill. Rev. Stat. (Cahill, 1933) C. 111a, § 51; Va. Code Ann. (1936) § 4071a.

** In an earlier case, a lower court had stated that a temporary rate "cannot be confiscatory, assuming reasonable progress in the proceeding leading to a final rate" (Unreported Opinion, Record on Appeal (p. 78), *Staten Island Edison Corporation* v. *Maltbie,* 267 App. Div. 72).

(*Staten Island Edison Corp.*, v. *Maltbie*, 267 App. Div. 72; aff'd 292 N. Y. 611).

Two years later, in June 1945, the Commission prescribed as permanent rates the same reduction. In an action in equity, these permanent rates were enjoined *pendente lite* as confiscatory (270 App. Div. 55; aff'd 296 N. Y. 374). The temporary rates were, however, continued. Nearly *six years later*, in March, 1949, the Commission made an order terminating the temporary rate order of May, 1943, abrogating the permanent rate order of June, 1945, and authorizing the company to increase its rates by 5 per cent over those in effect before the temporary rate order of 1943, or 14 per cent over the temporary rates. Although the Commission found that, on the basis of an adjusted rate base, the company had earned in 1948 a return of only 3.36 per cent (Report, P. S. C. Case No. 14187, February 28, 1949), it expressly noted (at p. 31) "that the question of whether or not the presently effective rates and charges [i.e., the "temporary rates" of 1943] yielded a fair return since their institution must be left for further consideration at the time when final rates are prescribed."

Finally, the Commission on December 28, 1949, by a memorandum decision in Cases Nos. 8983 and 14187, granted the Staten Island Edison Corporation a further increase of about 5 per cent in electric rates, but without "attempt" to determine the amount of reimbursement, if any, to which it might be entitled.

In the light of the Commission's administration of Section 114 and the construction which the Court below has placed upon that statute, the promise of recoupment is not a sufficient assurance of just compensation. The taking of property, whether it be in the exercise of eminent domain or in the fixation of rates (*West* v. *Chesapeake & Potomac Telephone Co.*, 295 U. S. 662, 671), necessitates the provision

of an adequate, certain and convenient remedy by which the owner can subsequently receive compensation (*Sage* v. *City of Brooklyn*, 89 N. Y. 189). Moreover, as this Court has stated respecting the sufficiency of the provision for compensation in a state statute authorizing the taking of land for public use (*Joslin Company* v. *Providence*, 262 U. S. 668, 677):

> "• • • the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge. • • •"

The more than sixteen years of experience under Section 114 have failed to reveal a single instance in which recoupment has proven an adequate, certain and convenient remedy against confiscation. Section 114 does not pledge anyone's faith or credit to assure the fulfillment of making just compensation when rates prove to be insufficient. All that exists for the protection of a utility which for sixteen months has been suffering daily and mounting losses is the vague and never yet fulfilled promise of recoupment. Endless repetition of a promise to make amends in the future is not a constitutionally adequate safeguard against present harm. "Present confiscation is not atoned for by merely holding out the hope of a better life to come" (*West Ohio Gas Co.* v. *Comm'n (No. 2)*, 294 U. S. 79, 83).

In the last analysis, it should be stressed that in *Driscoll* v. *Edison Co.*, 307 U. S. 104, this Court did not regard the recoupment provision of the Pennsylvania temporary rate statute* as a safeguard against irreparable injury. On the contrary, it was there held that, absent injunctive relief against irreparable injury, the remedy in the State Courts

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* The Pennsylvania statute was patterned after Section 114 of the New York Public Service Law. See P. L. 1053, Purdon's Pa. Stat. Ann., 1941, Title 66, § 1150.

was not "plain, speedy and efficient." According to the Court (307 U. S. at p. 110):

> "• • • The remedy at law by appeal is ineffective to protect the utility's position *pendente lite*. The supersedeas does not postpone the application of the temporary rates.• • •"

The decision in the *Driscoll* case is a holding by this Court that recoupment is not a "plain, speedy and efficient" remedy to protect a utility against irreparable injury. This, we submit, is authority that the expectation of recoupment is not an adequate remedy against confiscatory rates.•

7. As presently construed, the laws of New York do not afford a safe and adequate judicial review of temporary rates prescribed by the Commission under Section 114

In its argument that effective judicial review of temporary rates is available in the Courts of New York, as in its reliance upon recoupment, the Commission treats with theory and not reality. Perhaps the clearest proof of this is found in the now ironical assertion by the Commission that a stay of a temporary rate order is available upon a proper showing of great and irreparable damage. Ignored completely by the Commission is the statement of the lower Court in the present case, sustaining the Commission's contention as then made, that (193 Misc. 1015, 1018, denying appellant's application for a stay *pendente lite*):

> "The same reasoning that precludes an injunction against a temporary rate in an equity action would preclude the granting of a temporary stay in a proceeding under article 78 of the Civil Practice Act

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• See Note, 34 Ill. L. Rev. 214, 216, where the author states:

> "• • • when the Supreme Court held that the lower court had jurisdiction under the Johnson Act they were, in effect, saying that a recoupment provision does *not* afford an adequate remedy against temporary confiscatory rates." (Italics in original.)

> whose sole purpose is to review a temporary rate; in other words, when a temporary rate to be charged by a public utility company is fixed by the Commission, in purported accordance with the statute, *the right to a stay, which existed prior to its enactment, still exists theoretically but for all practical purposes, it may fairly be said to be extinct.*" (Italics supplied.)

If, after this decision, there remained any doubts that the right to a stay was only a theory, they were removed by the decision of the Court below, which stated (300 N. Y. 196, at p. 202):

> "On a prior appeal recently before us [same case, 299 N. Y. 172], we held that, in view of the recoupment provisions of section 114, the alleged failure of the commission to follow the requirements of the statute did not warrant an injunction against the enforcement of its order pending appeal, and we accordingly reversed an order of the Appellate Division that granted a stay."

In the face of one decision holding that the right to a stay exists only "theoretically", affirmed by another which states that the Commission's failure to follow Section 114 would not warrant relief pending appeal, the Commission asserts that the right to a stay is one of the Company's protections "against any deprivation of constitutional rights" (Statement Opposing Jurisdiction, p. 13). Surely, unless appellant's constitutional rights are only theoretical, it should not be compelled to rely for their protection upon a remedy which, "for all practical purposes", "may fairly be said to be extinct".

According to the Commission, effective judicial review of the temporary rates is also available under Article 78 of the Civil Practice Act, which affords "a full review of all question of law, including the question of whether there was evidence to sustain the findings of the Commission" (*id.*, at p. 15). Unwittingly, however, the Commission's argument reveals the impracticality of such judicial review as applied to the Commission's actions.

The all-essential fact is that the Commission in this case acted without considering and weighing the evidence before it, without making findings thereon, and without disclosing the reasons and factual grounds underlying its determination. By this arbitrary course of procedure, the Commission rendered meaningless any judicial review, for, as has long been recognized, effective judicial review depends upon a regulatory agency's disclosure of the reasons and factual grounds underlying its determination (See *Wichita R.R.* v. *Public Utilities Commission*, 260 U. S. 48, 58-59; *Mahler* v. *Eby*, 264 U. S. 32; *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, 198).

As stated by Mr. Justice Cardozo (*U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, at p. 511):

> "* * * We must know what a decision means before the duty becomes ours to say whether it is right or wrong".

And in *American Broadcasting Co.* v. *Federal Communications Commission*, 179 F. 2d 437, 444 (C. C. A. Dist. of Col.), it was stated:

> "* * * in a succession of judicial decisions it has been pointed out that the process which the Commission properly follows in reaching a decision includes the taking and weighing of evidence, a determination from attentive consideration of this evidence of facts of a basic or underlying nature, a determination by rational inference from these basic facts of the ultimate facts in the case, and finally, an announcement of the decision of the Commission by application of the statutory criterion. It has been pointed out further that when a decision is accompanied by proper findings of fact, the reviewing court can decide whether the decision reached by the Commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence; but that in the absence of proper findings of fact, the reviewing tribunal can determine neither of these things. * * *"

The experience of this Company and other utilities demonstrates the wholly theoretical nature of the judicial review of temporary rates available in New York. Experience has also demonstrated that neither the equity nor certiorari review of permanent rates, available under New York law, protects the Company against the effect of the temporary rates.

In the *Staten Island Edison Corp.* case, (discussed *ante*, at pp. 39, 40), as also in *County Transportation Company* v. *Maltbie*, 273 App. Div. 437, aff'g in part 189 Misc. 743, the Commission after considerable delay fixed permanent rates at the same level as the temporary rates. Although, in each case, the company succeeded in enjoining the permanent rates, nevertheless the identical temporary rates were held to continue in effect. Thus, judicial review in New York of confiscatory permanent rates afforded nothing by way of relief against temporary rates.

We submit that this denial of all effective judicial review of the Commission's order prescribing temporary rates operates to deprive the appellant of its property without due process of law and to deny to it the equal protection of the laws.

Chicago, M. & St. P. Railway Co. v. *Minnesota*, 134 U. S. 418.

8. As presently construed, Section 114 constitutes a grant of arbitrary power

Under the decision of the Court below, Section 114 enables the Commission to avoid its duty to fix permanent rates upon the completed record before it, and to prescribe, instead, temporary rates for an indefinite period, upon a rate base adopted by it as a matter of administrative fiat. With the unfettered discretion now granted to it by that decision, the Commission is authorized to determine temporary rates without considering and weighing relevant

evidence on the all-important questions of depreciation and rate of return, without making any finding upon the evidence before it and without disclosing in any way the reasons and factual grounds which begot its urgent determination.

The construction which the Court below has placed upon Section 114 renders that statute squarely in conflict with decisions of this Court which prohibit arbitrary grants of power to regulatory agencies.

> *Yick Wo* v. *Hopkins,* 118 U. S. 356;
> *Interstate Commerce Commission* v. *Louisville & Nashville R. R.,* 227 U. S. 88, 91;
> *Southern Railway Co.* v. *Virginia,* 290 U. S. 190;
> *Panama Refining Co.* v. *Ryan,* 293 U. S. 388;
> *Schechter Corp.* v. *United States,* 295 U. S. 495.

The unlimited discretion granted to the Commission under Section 114 is the very sort of power to which this Court referred, when it stated (*Bradley* v. *Richmond,* 227 U. S. 477, 481):

> "• • • An ordinance which commits to a board, committee or single official the power to make an *arbitrary* classification for purposes of taxation, would meet neither the requirement of due process, nor that of the equal protection of the law." (Italics in original.)

We respectfully submit that, for the reasons stated, substantial Federal questions have been shown to exist in this case, and that accordingly the appellees' motion to dismiss or affirm should be denied.

II. The order and judgment confirming the temporary rate order are final for the purpose of an appeal to this Court.

The Federal questions presented by this appeal are whether the promise of recoupment in the future justifies a present denial of procedural due process, the imposition of confiscatory "temporary" rates for an indefinite period and the withdrawal of all effective judicial review of the Commission's action. According to the Commission, the Federal issues thus presented are "wholly premature" since appellant's constitutional rights are fully protected by the recoupment alleged to be available in the fixing of permanent rates (Statement Opposing Jurisdiction, p. 17).

The circuity of the Commission's reasoning is apparent. It assumes as a premise the answers to the very questions before this Court. A holding by this Court that the issues presented are premature would constitute, in effect, an acceptance of the Commission's argument that the validity of its action "cannot properly be tested by reference to constitutional standards of procedural due process" (Statement Opposing Jurisdiction, p. 13) and a rejection of appellant's constitutional claims.

If appellant's contentions are valid, and recoupment is not an adequate constitutional safeguard, there is an "immediate threat of irreparable damage * * *, rendering postponed review so illusory as to make the decree 'final' now or never" (*Republic Gas Co.* v. *Oklahoma,* 334 U. S. 62, 70).

The Commission's action in prescribing temporary rates has subjected the Company to a present obligation, "immediate and absolute," to charge the prescribed rates for its contemporaneous service, and the order and judg-

ment appealed from are thus final for the purpose of an appeal to this Court.

> *Knox Loan Ass'n* v. *Phillips*, 300 U. S. 194, 198; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69.

III. The Federal questions raised herein are not res judicata.

In reversing the Appellate Division, which had granted appellant's motion for a stay of the temporary rates pending appeal, the Court of Appeals held that the recoupment provision of Section 114 precluded any finding of great and irreparable damage* (299 N. Y. 172). According to the Commission, the decision of the Court of Appeals upon the question of interlocutory relief was appealable to this Court and the absence of such appeal has the effect of finally adjudicating the issues herein (Statement Opposing Jurisdiction, pp. 17-18).

The fallacy in this argument is twofold.

First. It assumes, contrary to a long line of decisions, that the decision of the highest court of a State on a question of interlocutory relief is appealable to this Court. As this Court has stated (*Moses* v. *The Mayor*, 15 Wall. 387, 390):

> "* * * Obviously, there was no final decree. The only decree rendered in the Supreme Court was that the injunction [preliminary] of the court below be dissolved. That decree was in no sense final. It left the whole case to be disposed of upon its merits. This has been frequently decided."

---

* Section 23(2) of the New York Public Service Law requires specific findings of great and irreparable damage by any Court issuing an injunction against a rate order of the Commission.

Established beyond contention is the fact that this Court does not view as final, for the purpose of an appeal, the decision of a state court upon a question of interlocutory relief.

Gibbons v. *Ogden*, 6 Wheat. 448;
Verden v. *Coleman*, 18 How. 86;
Brannan v. *Harrison*, 284 U. S. 579;
Williams v. *Quill*, 303 U. S. 621.

See also, Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, p. 67; Boskey, Finality of State Court Judgments Under the Federal Judicial Code, 43 Col. L. Rev. 1002, 1017.

SECOND. Even if it were assumed that the decision upon the question of relief *pendente lite* might have been appealed to this Court, the absence of such an appeal could not preclude an adjudication of the issues presented in the proceeding upon the merits. For as this Court has stated with respect to the *res judicata* effects of decisions upon questions of interlocutory relief (*Denny* v. *Bennett*, 128 U. S. 489, at p. 499):

> "* * * we concur with the Supreme Court of the State of Minnesota * * * in holding that 'it was merely a decision of a motion or summary application which is not to be regarded in the light of *res adjudicata* * * *.'"

And as the Court below has held (*Walker Memorial Baptist Church* v. *Saunders*, 285 N. Y. 462, 474):

> "* * * The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for * * *."

See also *Hunt* v. *Seeley*, 115 F. 2d 205 (C. C. A. 5th); 50 C. J. S. § 620.

CONCLUSION

The appellees' motion to dismiss or affirm should be denied and this Court should retain jurisdiction of the appeal.

Dated, May 18, 1950.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 824

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

vs.

MILO R. MALTBIE, NEAL BREWSTER, MAURICE C. BURRITT, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, ALBANY COUNTY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

GEORGE H. KENNY,
Assistant Counsel to Public Service Commission.
SHERMAN C. WARD,
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SAMUEL R. MADISON,
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STATUTES CITED

New York Civil Practice Act, Article 78:

Section 1299 16

Public Service Law of New York:

Section 23(2) 2, 7
Section 114 16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 824

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

against

MILO R. MALTBIE, NEAL BREWSTER, MAURICE C. BURRITT, GEORGE A. ARKWRIGHT AND SPENCER B. EDDY, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

May it please the Court:

Now come the appellees in the above entitled cause by their counsel of record and submit their statement in opposition to jurisdiction and move that the appeal herein be dismissed or that the order and judgment appealed from be affirmed.

Statement

This is an appeal from an order and judgment entered January 23, 1950, in the Supreme Court of the State of New York, upon the amended remittitur of the Court of Appeals of the State of New York, which confirmed a determination and order of the Public Service Commission of the State of New York, adopted on December 30, 1948, prescribing temporary rates to be charged by the appellant for electric service pending the fixing of final rates. The proceeding is in the nature of certiorari under Article 78 of the New York Civil Practice Act.

The prescribed temporary rates became effective on January 10, 1949, and are in effect at the present time. The final rates have not yet been prescribed.

The temporary rates were prescribed pursuant to Section 114 of the Public Service Law, which authorizes the Commission in any pending rate proceeding to fix temporary rates which shall be sufficient to provide a return of not less than five per cent upon the original cost, less accrued depreciation, of the physical property used and useful in the public service. Section 114 provides, in part, as follows:

> "Temporary rates so fixed, determined and prescribed under this section shall be effective until the rates to be charged, received and collected by said utility company shall finally have been fixed, determined and prescribed. The commission is hereby authorized in any proceeding in which temporary rates are fixed, determined and prescribed under this section, to consider the effect of such rates in fixing, determining and prescribing rates to be thereafter charged and collected by said public utility company on final determination of the rate proceeding."

Under the decisions of the Court of Appeals, this paragraph of the statute, commonly referred to as the "recoup-

ment provision," operates to protect the utility company from any loss which may be sustained by reason of the fact that temporary rates may have been fixed at too low a level. The temporary rates prescribed under Section 114 are not final for the period of their duration. When the Commission fixes the final rates, it is required to examine the experience of the utility company under the temporary rates and to fix the final rates at a level which will reimburse the company for any deficiency below a fair return for the temporary rate period.

Matter of Bronx Gas & Electric Co. v. *Maltbie,* 271 N. Y. 364;

Matter of Consolidated Edison Co. of N. Y. v. *Maltbie,* 299 N. Y. 172;

Matter of Consolidated Edison Co. of N. Y. v. *Maltbie,* 300 N. Y. 196;

cf. *Staten Island Edison Corp.* v. *Maltbie,* 267 App. Div. 72, aff'd. 292 N. Y. 611.

Upon the institution of this review proceeding, the appellant moved in the New York Supreme Court for a stay of enforcement of the temporary rate order pending the review. Under Section 23 (2) of the Public Service Law such a stay could not be granted except upon a finding by the court, supported by evidence, that great and irreparable damage would otherwise result to the applicant. The Special Term denied the application (193 Misc. 1015) but the Appellate Division, Third Department, granted a stay (275 App. Div. 731). However, the Court of Appeals reversed and denied the application for a stay upon the ground that the appellant herein was amply protected against great and irreparable damage by the recoupment provision of Section 114, and that there had been no showing that the recoupment provision would not afford full protection to the appellant under the circumstances of this case (299 N. Y.

172). The present appellant did not attempt to appeal to this Court from the order entered upon that decision.

In fixing the temporary rate base the Commission utilized the latest available figures shown by appellant's books (as of September 30, 1948) with the sole exception of the reserve for depreciation. It appeared from the testimony of the Company's own witnesses that the amount of accrued depreciation existing in appellant's properties exceeded the amount of its book reserve for depreciation, as shown in its reports to the Commission, by at least $40,000,000. A highly qualified consulting engineer in the employ of the Commission, Mr. Goldthwaite, testified to an amount of accrued depreciation which exceeded the book reserve by $95,500,000.

Section 114 of the Public Service Law, with reference to the fixing of the temporary rates, provides in part as follows:

> "• • • if the duly verified reports of said utility company to the commission do not show the original cost, less accrued depreciation, of said property, the commission may estimate said cost less depreciation and fix, determine and prescribe rates as hereinbefore provided."

Acting under this provision, the Commission deducted from the original cost of the properties an amount of "accrued depreciation" which was estimated in accordance with the testimony of Mr. Goldthwaite, arriving at a rate base of $558,000,000. Utilizing the appellant's book figures for revenues and expenses in the base year ended September 30, 1948, with an estimated increase of $4,040,000 in taxes, and including the full amount of the appellant's book charge for annual depreciation, the Commission estimated that the prescribed rates would provide an annual return of $30,261,410, which is equal to a return upon the tempo-

rary rate base, as determined by the Commission, of 5.42 per cent.

Upon the merits of this review proceeding, the principal contention of the appellant before the courts of New York, was that the statute (§ 114) did not authorize the Commission to adopt an estimate of the accrued depreciation of the physical properties, and that under the circumstances of the case the Commission was required to utilize the appellant's book reserve for depreciation in arriving at the temporary rate base. The Appellate Division, by a four to one decision, held that the Commission did not possess the statutory power to make such an estimate (275 App. Div. 475). The Court of Appeals reversed and held that the Commission possessed such authority under the statute (300 N. Y. 196). In addition the Court of Appeals held that the Commission's determination was amply supported by the record and that no error had been committed in the making thereof. The Court of Appeals said, in part:

> "In a case such as the present, where a witness for the commission has testified that the figure for accrued depreciation is $95,000,000 more than the reserve accumulated by the company on its books, and a witness for the company itself has indicated that the actual depreciation exceeded the book reserve by some $40,000,000, the commission need not blind itself to the fact that the reserve so accumulated upon the company's books does not—as reasonable men would use the word—'show' the accrued depreciation. The commission was authorized, therefore, to make an estimate of that item. In the light of the evidence adduced, it may not be said that its figure of $255,000,000 was without support. While other and variant figures were in the record, the courts will not and cannot assume that the commission failed to consider them in reaching its estimate, which concededly was not a final determination."

The Court of Appeals also pointed out that the construction which it placed upon the statute, authorizing the use of an estimate of accrued depreciation in place of the concededly inaccurate book reserve for depreciation, was more in accord with the legislative intent and was "more reasonable and fair, than alternative interpretations." The Court noted that the statutory objectives of "expedition and promptness" would be readily achieved and that when the book reserve for depreciation is "known to be misleading," the "substitution of a more accurate figure" would enhance the value of the experience under the temporary rates for use in fixing final rates (300 N. Y. at p. 207). The Court specifically noted that under the recoupment provision the utility companies would be fully protected if the temporary rates proved to be too low.

> "And, finally, if a temporary rate order is made within the framework of section 114—as it here was—the recoupment provisions of that section apply to prevent any injustice or prejudice to the company even if the temporary rate fixed is later found to have been placed at too low an amount. (See *Matter of Consolidated Edison Co.* v. *Maltbie, supra,* 299 N. Y. 172; *Matter of Bronx Gas & Elec. Co.* v. *Maltbie, supra,* 271 N. Y. 364.)" (300 N. Y. at p. 207.)

Neither the Appellate Division nor the Court of Appeals, in their respective opinions, referred to any constitutional issue sought to be raised by the appellant here. Any constitutional issue properly raised was, of course, subject to decision by the New York courts in this proceeding, as well as any other question of law, including the question of whether there was evidence to sustain the findings of the Commission (*New York ex rel. Consolidated Water Co.* v. *Maltbie,* 303 U. S. 158, and cases there cited.) Apparently the courts of New York did not believe that any substantial constitutional question had been raised. Use of the cus-

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tomary language in the amended remittitur to indicate that the Court of Appeals "necessarily" passed upon constitutional questions is significantly absent. As appears from the petition for appeal herein, the Chief Judge of the Court of Appeals, on April 11, 1950, denied appellant's petition for an order allowing an appeal, and the present appeal is taken under the order of Mr. Justice Jackson dated April 12, 1950.

ARGUMENT

I. This Court Should Refuse to Entertain Jurisdiction Herein for the Reason That No Substantial Federal Question Is Involved.

1. *The Commission acted fairly and reasonably within the framework of the statute and its determination was not in any respect arbitrary or illegal.*

The Commission in this case adhered meticulously to the statutory standards contained in Section 114 of the Public Service Law. In constructing the rate base, the Commission adopted the appellant's own book figures for original cost. Since all of the testimony, including that of appellant's witnesses, showed that the book reserve for depreciation did not show the accrued depreciation of the property, the Commission determined to adopt an "estimate" thereof for temporary rate purposes, as specifically authorized by Section 114.

The appellant's own witnesses had testified to amounts of accrued depreciation which exceeded the reserve account by about $40,000,000. The Commission's engineer testified that the accrued depreciation exceeded the reserve account by about $95,000,000. The depreciation testimony was highly complex and very voluminous, occupying about 15 per cent of the long record. A complete analysis of the extensive testimony and exhibits relating to depreciation,

and the making of a final and conclusive determination of the accrued depreciation of the properties would have consumed a prohibitive period of time. If the temporary rates were required to be fixed on the basis of such an analysis and determination, the temporary rate order could not have been made. Accordingly, the Commission adopted, solely as an "estimate" for temporary rate purposes, the amount of accrued depreciation (about $255,000,000) testified to by its engineer, Mr. Goldthwaite. This is not to say that the Commission disregarded the testimony of the appellant's witnesses or that it acted unfairly or arbitrarily. The determination did not relate to final rates. In view of the recoupment provision of Section 114, the determination was not final in its effect. The Commission in the exercise of its administrative discretion determined that for temporary rate purposes the testimony of Mr. Goldthwaite represented a reasonably accurate figure upon which to base an estimate of the accrued depreciation. As stated by the Court of Appeals:

> "In the light of the evidence adduced, it may not be said that its figure of $255,000,000 was without support. While other and variant figures were in the record, the courts will not and cannot assume that the commission failed to consider them in reaching its estimate, which concededly was not a final determination." (300 N. Y. at p. 207.)

Having thus arrived at the temporary rate base of $558,000,000, the Commission utilized the appellant's actual book figures for revenues and expenses to arrive at a return of not less than 5 per cent upon such rate base, as provided by Section 114. The appellant's claim that the Commission, for this purpose, reduced appellant's annual charge for depreciation expense is wholly illusory. In projecting the prospective annual revenues and expenses for the temporary rate period, the Commission adopted appellant's

own book figures for the base year ended September 30, 1948, adjusted only for estimated taxes, the estimate exceeding the actual taxes for the base period by $4,040,000.

The temporary 10 per cent reduction of rates in the specified rate classifications was computed by the Commission to result in a reduction in revenues of $21,500,000. Due to the concomitant savings in gross revenue taxes and income taxes, the reduction of operating income, after taxes, would be $12,427,000, leaving a net operating income, after taxes, and after the rate reduction, in the amount of $30,261,410. This was the amount to be available for return.

The effect of the temporary rate reduction, with reference to the figures taken directly from the appellant's books for the base year, is shown in the Company's petition in this proceeding by a tabulation, summarized as follows:

Electric Department, Operating Income, before Income Taxes	$62,688,410
Less Federal Income Taxes (as estimated by the Commission)	20,000,000
Electric Department Net Operating Income	$42,688,410
Reduction of Operating Income resulting from Rate Reduction of $21,500,000, after gross Revenue Taxes and Income Taxes at 42.2 per cent	12,427,000
Electric Department Net Operating Income after Rate Reduction	$30,261,410

The estimated return of $30,261,410, which is stated by the appellant itself to be its actual return, adjusted for the temporary rate reduction, during the base year (Appellant's typewritten statement as to jurisdiction, par. IV, p. 13), would provide a return of 5.42 per cent upon the Commission's rate base. As said by the Appellate Division of the New York Supreme Court in this case: "Computed on a net physical property valuation of $558,000,000, as fixed

by the commission, the temporary rates, based on the amount of electric service sold during the base year ending September 30, 1948, would produce a return of more than the 5% provided by statute * * *." (275 App. Div. at p. 478.)

The statute (§ 114) does not require the Commission to make a final and conclusive determination of the fair rate of return to which the appellant would be entitled under final rates. The statute provides only that the return must not be less than 5 per cent upon the original cost less accrued depreciation of the physical property. This requirement was complied with in this case. Even when the entire amount of the appellant's construction work in progress ($38,000,000) is added to the Commission's rate base, the return would be 5.07 per cent.

All of appellant's claims of arbitrary and improper action by the Commission have been fully presented to the courts of the State of New York and upon full consideration have been held to be without substance. The majority of the Appellate Division held, solely as a matter of statutory construction, that the Commission was required to accept the appellant's book reserve for depreciation. The Court of Appeals reversed, holding that the statute authorized the Commission to adopt an estimate of accrued depreciation. Not a single Justice of the Appellate Division, and not a single Judge of the Court of Appeals, has held or even intimated that, under the proper construction of the statute, the Commission has acted unfairly, unreasonably, arbitrarily or in anywise improperly.

The present case falls squarely within the statement made by this Court in dismissing the appeal in *New York ex rel. Consolidated Water Co.* v. *Maltbie*, 303 U. S. 158, 160:

> "2. Upon the review of the Commission's orders by certiorari, only questions of law were open under the state practice, including the question whether there

was evidence to sustain the findings of the Commission. 275 N. Y. at p. 366; 9 N. E. 2d 961. In that view no substantial federal question is presented. *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655, 668-670; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91, 92; *New York ex rel. New York & Queens Gas Co.* v. *McCall*, 219 N. Y. 84, 88-90, 245 U. S. 345, 348, 349. The motion to dismiss is granted."

2. *The temporary rate statute, as construed by the Court of Appeals and as applied by the Commission, does not violate any of appellant's constitutional rights.*

It will be observed at once that the appellant does not contend that the general scheme of Section 114 of the Public Service Law, by which temporary rates are prescribed on the basis of at least a 5 per cent return upon original cost less accrued depreciation, without consideration of all of the factors entering into the fixing of permanent rates, but with recoupment to the appellant for any deficiency below a fair return during the temporary rate period, is *per se* unconstitutional. No such claim was made before the courts of New York in this proceeding and accordingly such a claim, if now presented, would not support the jurisdiction of this Court (cf. *Memphis Natural Gas Co.* v. *Bieler*, 315 U. S. 649). But, as stated, appellant does not even now advance this claim. And if it did, the claim would be wholly without substance for all of the reasons stated by the Court of Appeals when such a contention was directly advanced to that Court by a predecessor in interest of the present appellant.

Matter of Bronx Gas and Electric Co. v. *Maltbie*, 271 N. Y. 364.

The contention of the appellant upon this appeal, as set forth in the first six assignments of error, is that the statute (§ 114), as applied by the Commission in this case,

operates to deprive the appellant of its property without due process of law because the Commission did not make a final and conclusive determination as to the accrued depreciation of the property (Assignment No. 1); as to the proper annual depreciation charge (Assignment No. 2), and as to the fair rate of return to which the appellant would be entitled in the fixing of final rates (Assignment No. 3). The result, it is claimed, is that appellant has been denied "procedural due process of law" (Assignments Nos. 1, 2 and 3); that the statute constitutes a grant to the Commission of "unlimited discretion and a delegation of arbitrary power to fix rates, in violation of constitutional guarantees" (Assignment No. 5); that the Commission's order "would result in the confiscation of appellant's property" (Assignment No. 4); and, finally, that the recoupment provision of Section 114, under such circumstances, is "not a sufficiently adequate, certain or convenient protection to the appellant," so that the statute operates to deprive the appellant of its property without due process of law (Assignment No. 6).

There has been no factual showing whatever, at any stage of this case, that the recoupment provision of Section 114 will not operate to fully protect the appellant from any loss which might occur if the temporary rates had been fixed at too low a level. This was the unanimous decision of the Court of Appeals when it denied the appellant's motion for a stay pending review in this case. Referring to the rationale of the decision of the Appellate Division granting a stay (275 App. Div. 731), the Court of Appeals said:

> "The answer to these misgivings is to be found, we think, in the construction which this court put upon section 114 in *Matter of Bronx Gas & Elec. Co.* v. *Maltbie* (271 N. Y. 364, 375). Section 114, we there said, 'forces the Public Service Commission to consider the returns from the temporary rate and to establish the permanent rate, or the final rate, accordingly; that is, if the temporary rate has proved to be

too low the final rate must make it up to the company. Over what time it is necessary to provide a rate sufficient to make up the loss, or to include the take-up, is a matter of adjustment, machinery and method. These matters are all in the hands of the Public Service Commission, which may increase or modify a rate to meet the circumstances at any time.'

The recoupment proviso of section 114 is applicable to the temporary rates here in question. Hence, 'great and irreparable damage' cannot result to the company from the temporary rate order, notwithstanding the Commission made its own estimate of the depreciation of the used and useful physical property of the company instead of accepting the figures shown on the company's records. Hence, too, the magnitude of the sums that the company may be entitled to recapture does not demonstrate either the existence of 'great and irreparable damage' or the inadequacy of the recoupment proviso of section 114 (see *Staten Is. Edison Corp.* v. *Maltbie*, 292 N. Y. 611)." (*Matter of Consolidated Edison Co.* v. *Maltbie*, 299 N. Y. 172, 176.)

The recoupment provision, of course, does not authorize the Commission to take arbitrary, improper or illegal action in the fixing of temporary rates upon the theory that ultimately any resulting detriment to the utility companies will be corrected in the fixing of final rates. But the validity and legality of action taken by the Commission cannot properly be tested by reference to constitutional standards of procedural due process applicable to the taking of ultimate administrative action which would finally affect the property rights involved. Under the New York system of ratemaking, integrated within the provisions for judicial review, such constitutional standards are applicable only when the final rates are fixed. Meanwhile the statutory provision for recoupment, coupled with the right of the company to apply for a stay of enforcement of the temporary rates

upon a showing that great and irreparable damage would otherwise result, affords ample protection against any deprivation of constitutional rights.

In the case of *Beaver Valley Water Co.* v. *Driscoll*, 28 F. Supp. 722, the three-judge statutory Court examined similar contentions with reference to alleged "violation of the procedural protection afforded by the due process clause" in respect to the fixation of temporary rates under the similar provisions of the temporary rate statute of Pennsylvania. The Court rejected the arguments, saying in part (p. 726):

> "The Water Company further contends that the interim order was made by the Commission in violation of the procedural protection afforded by the due process clause. It alleges that it was prevented from presenting pertinent testimony to the examiner when the Commission cancelled the January 27th hearing and that the interim order was made without giving it an opportunity to present its case upon written briefs and oral argument. It must be remembered that the protection offered by the due process clause is against the deprivation or confiscation of property. As we have shown the temporary rates prescribed by the Commission do not affect finally or permanently the rights of the Water Company in such fashion as to deprive that company of its property. We, of course, do not hold that temporary rates may be fixed by the Commission capriciously or arbitrarily and without regard "to the minimum standard laid down in the statute. * * * In fixing a rate which is truly temporary in its effect we think that the Commission need have before it merely sufficient evidence to furnish prima facie support for its findings. An analogy may be found in the right of a court of equity to issue an interlocutory injunction ex parte, such as was issued in this case. The procedural safeguards afforded by the due process clause will be fully available to the Water Company in the proceedings to determine the final rates" (p. 726).

The Court of Appeals of the State of New York has directly held on at least four occasions that the Commission, when it fixes final rates, must permit the Company to recoup the difference, if any, between just and reasonable rates and the temporary rates, for the period while the temporary rates have been in effect.

Matter of Bronx Gas and Electric Co. v. *Maltbie,* 271 N. Y. 364;

Staten Island Edison Corp. v. *Maltbie,* 292 N. Y. 611, aff'g 267 App. Div. 72;

Matter of Consolidated Edison Co. of N. Y. v. *Maltbie,* 299 N. Y. 172;

Matter of Consolidated Edison Co. of N. Y. v. *Maltbie,* 300 N. Y. 196.

In the first *Staten Island Edison Corporation* case, *supra,* the Court of Appeals affirmed, without opinion, a decision of the Appellate Division that in view of the recoupment provision of Section 114, no case of confiscation was properly presented with respect to a temporary rate order of the Commission and that this constitutional issue could not properly be presented except upon review of the final rate order of the Commission.

Staten Island Edison Co. v. *Maltbie,* 267 App. Div. 72, aff'd. 292 N. Y. 611;

cf. *Staten Island Edison Co.* v. *Maltbie,* 296 N. Y. 374.

The contentions of the appellant that the statute (§ 114), and the operation thereof in this case, deprive the appellant of its property without due process of law and are violative of appellant's constitutional rights are wholly without substance.

3. *The contention that the laws of New York do not afford effective judicial review, is without substance.*

The seventh assignment of error is to the effect that, "as presently construed, the laws of New York do not afford effective judicial review by the Courts of that State of temporary rates prescribed by the Commission under Section 114," and, therefore, that the section is unconstitutional. It follows from what has already been said, that this contention is wholly without merit.

The temporary rate orders of the Commission, made under Section 114 of the Public Service Law, are reviewable by a proceeding such as the present one, in the nature of certiorari, under Article 78 of the Civil Practice Act.

Matter of Consolidated Edison Co. of N. Y. v. *Maltbie,* 300 N. Y. 196;

cf. Staten Island Edison Corp v. *Maltbie,* 267 App. Div. 72, aff'd. 292 N. Y. 611.

The procedure under Article 78 affords a full review of all question of law, including the question of whether there was evidence to sustain the findings of the Commission.

N. Y. ex rel. Consolidated Water Co. v. *Maltbie,* 303 U. S. 158.

Under Article 78 of the Civil Practice Act, a stay may be granted of the enforcement of a temporary rate order made under Section 114 of the Public Service Law, upon a proper factual showing that the recoupment provision of that section will not protect the utility company against great and irreparable damage.

Civ. Prac. Act, § 1299;

Pub. Ser. Law, § 23 (2);

cf. Matter of Consolidated Edison Co. of N. Y. v. *Maltbie,* 299 N. Y. 172.

Upon the fixing of final rates, the Commission is required to grant recoupment for any deficiency below a fair return

under just and reasonable rates, suffered by the utility company during the temporary rate period (see cases cited supra). And in respect to such a final rate order the utility company is not only entitled to the limited review provided by Article 78 of the Civil Practice Act, but under the law of the State of New York is entitled to maintain an action in equity to enjoin enforcement of the final rates, in which action the Court may exercise its independent judgment upon the facts as well as the law.

Staten Island Edison Co. v. *Maltbie*, 296 N. Y. 374.

In an action or proceeding to enjoin or review a final rate order, the utility company, upon a proper showing that substantial Federal questions are involved, may appeal to this Court and obtain full protection of its constitutional rights.

cf. N. Y. ex rel. Consolidated Water Co. v. *Maltbie*, 303 U. S. 158.

We respectfully submit that, for the reasons stated, no substantial Federal question has been shown to exist in this case and, accordingly, that the appeal should be dismissed or the order and judgment appealed from should be affirmed.

II. The Order and Judgment Confirming the Temporary Rate Order Are Not Final for the Purpose of an Appeal to This Court.

Since, under the New York practice, the appellant will be fully indemnified in the fixing of the final rates, against any loss suffered under the temporary rates, with full right of judicial review of the final rate order, including an appeal to this Court, it is apparent that the present attempt to raise issues under the Federal Constitution is wholly premature. The order and judgment appealed from are not final for the purpose of an appeal to this Court and, accord-

ingly, the appeal should be dismissed for that additional reason.

Republic Natural Gas Co. v. *Oklahoma*, 334 U. S. 62.

III. In Any Event, the Federal Questions Sought to Be Raised Herein Are Res Judicata and Will Not Sustain the Jurisdiction of the Court.

If there were any merit to the contention of the appellant that the recoupment provision of Section 114 of the Public Service Law, as construed by the Court of Appeals, is not adequate to protect the appellant in all of its constitutional rights, and if the Commission were incorrect in asserting that the temporary rate order is not sufficiently final in its effect to warrant this Court in entertaining jurisdiction of this appeal, then it seems clear that the appeal comes too late, and that the contentions of the appellant are *res judicata* under the earlier decision of the Court of Appeals denying the appellant's motion for a stay pending the review.

Matter of Consolidated Edison Co. of N. Y. v. *Maltbie*, 299 N. Y. 172.

The denial of a stay upon the ground that the recoupment provision protected appellant against great and irreparable damage was a complete rejection of the appellant's claim of a deprival of property without due process of law. Under appellant's contentions, which were advanced to the Court of Appeals upon the previous appeal, the recoupment provision does not protect it. If the appellant were correct in that contention, its constitutional rights were violated—its property irrevocably taken—when the Court of Appeals refused to stay the Commission's rate order by its decision of April 20, 1949. In that view the appellant could have taken an appeal to this Court from that decision. As this Court has recently said:

> "There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing." (*Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68; see also cases there cited.)

The failure of the appellant to take an appeal to this Court from a prior order of the Court of Appeals, having the effect of finally adjudicating the issue of a deprival of property without due process of law, would render the prior order *res judicata* and preclude further litigation of that issue.

Cf. New York State Electric & Gas Corp. v. *Public Service Commission*, 102 F. 2d 453.

Conclusion

The appeal herein should be dismissed or in the alternative the order and judgment appealed from should be affirmed.

Dated April 28, 1950.

Respectfully submitted,

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No. 824. CONSOLIDATED EDISON CO. *v.* MALTBIE ET AL. Appeal from the Supreme Court of Albany County, New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Jacob H. Goetz* and *Richard Joyce Smith* for appellant. *George H. Kenny* for appellees. Reported below: See 300 N. Y. 196, 645, 90 N. E. 2d 35, 498.